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Federalism and Fundamental Rights: The Ninth Amendment

by
CALVIN R. MASSEY*

I. Introduction

Two decades after its emergence from 175 years of constitutional hibernation, the ninth amendment continues to perplex those who seek meaning within it. The amendment was largely ignored by litigants and judges until Justice Goldberg, joined by Chief Justice Warren and Justice Brennan, fastened upon it as a basis for concurring in the Court's invalidation of state prohibition of contraceptive use in 1965.¹ As the nation prepares to enter its third century of constitutional interpretation, and issues of personal liberty and the proper distribution of political power between state and federal government occupy a central place on the judicial agenda, it is appropriate to examine, once again,² this "almost un-

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1. *Griswold v. Connecticut*, 381 U.S. 479 (1965). Justices Harlan and White each concurred separately in the Court's judgment. *Id.* at 499, 502. Justices Black and Stewart dissented. *Id.* at 507, 527. Justice Douglas authored the Court's opinion, in which he dared not venture as far as Justice Goldberg, preferring merely to include the ninth amendment among the provisions of the Bill of Rights that have "penumbras, formed by emanations from [such] guarantees." *Id.* at 484.

Only seven Supreme Court cases prior to *Griswold* dealt in any fashion with the ninth amendment: *Roth v. United States*, 354 U.S. 476, 492-93 (1957); *Woods v. Cloyd W. Miller Co.*, 333 U.S. 138, 144 (1948); *United Pub. Workers v. Mitchell*, 330 U.S. 75, 94-96 (1947); *Tennessee Elec. Power Co. v. Tennessee Valley Auth.*, 306 U.S. 118, 143-44 (1939); *Ashwander v. Tennessee Valley Auth.*, 297 U.S. 288, 330-31 (1936); *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393, 511 (1857) (Campbell, J., concurring); *Lessee of Livingston v. Moore*, 32 U.S. (7 Pet.) 469, 551 (1833) (in which the Court's reference to the "ninth article of amendment" is unclear and may refer to the ninth proposed amendment, the seventh amendment enacted).

2. The earliest scholarly study of the ninth amendment seems to be Kelsey, *The Ninth Amendment of the Federal Constitution*, 11 IND. L.J. 309 (1936). In the years from 1791 to 1936, only passing references were made to the ninth amendment by commentators. See, e.g., J. BAYARD, A BRIEF EXPOSITION OF THE CONSTITUTION OF THE UNITED STATES 184 (2d ed. 1834) (ninth amendment reflective of intent to prevent "unauthorized extension" of federal government's power); T. COOLEY, CONSTITUTIONAL LAW 36-37 (3d ed. 1898) (ninth amendment does not create rights but recognizes existing rights and operates to preserve them); S.

fathomable"³ constitutional provision.

When approaching the ninth amendment, problems seem to be legion. Is it superfluous? Is it merely a rule of construction? On its face it would seem to be so, for the amendment provides simply that

The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.⁴

Is it, as Dunbar and Berger contend, a declaration of an area in which government has "no power"?⁵ What was intended by its framers? Does it incorporate "natural law" theories of individual rights? If so, how can those rights be divined in any principled way? May it be enforced by the courts? Does it operate to prohibit state, as well as federal, action?⁶ Is it overridden by explicit constitutional grants of power to the federal government?⁷ Answers to these vexing questions are not easy. Indeed any

MILLER, LECTURES ON THE CONSTITUTION 650 (1891) (ninth amendment serves as a "just" rule of construction which would exist even in its absence); J. STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 751-52 (1st ed. 1833) (amendment confirms that unenumerated rights not surrendered to federal government); 2 H. TUCKER, THE CONSTITUTION OF THE UNITED STATES 688-89 (1899) (ninth amendment excludes inference that federal government could invade "great fundamental rights of the people").

A mass of literature pertaining to the ninth amendment has now developed. Some of the recent works are: C. BLACK, DECISION ACCORDING TO LAW (1981); J. ELY, DEMOCRACY AND DISTRUST (1980); M. GOODMAN, THE NINTH AMENDMENT 34-41 (1981); Berger, *The Ninth Amendment*, 66 CORNELL L. REV. 1 (1980); Caplan, *The History and Meaning of the Ninth Amendment*, 69 VA. L. REV. 223 (1983); Gibbons, *Keynote Address, Symposium: Constitutional Adjudication and Democratic Theory*, 56 N.Y.U. L. REV. 260, 272-73 (1981); Monaghan, *Our Perfect Constitution*, 56 N.Y.U. L. REV. 353, 365-67 (1981); Note, *The Right of Privacy: A Black View of Griswold v. Connecticut*, 7 HASTINGS CONST. L.Q. 777 (1980); Estreicher, Book Review, 56 N.Y.U. L. REV. 547 (1981) (reviewing J. ELY, *supra*); Van Alstyne, *Slouching Toward Bethlehem with the Ninth Amendment* (Book Review), 91 YALE L.J. 207 (1981) (reviewing C. BLACK, *supra*).

3. Dixon, *The Griswold Penumbra: Constitutional Charter for an Expanded Law of Privacy?*, 64 MICH. L. REV. 197, 207 (1965).

4. U.S. CONST. amend. IX. At least two commentators have thought the amendment was nothing more than a rule of construction. E. DUMBAULD, THE BILL OF RIGHTS 63 (1957), concludes that the ninth amendment "was designed to obviate the possibility of applying the maxim *expressio unius est exclusio alterius* (the expression of one [right] is the exclusion of alternative [rights]) in interpreting the Constitution." Justice Story believed that the ninth amendment "was manifestly introduced to prevent any perverse or ingenious misapplication of the well-known maxim, that an affirmation in particular cases implies a negation in all others." J. STORY, *supra* note 2, at 951.

5. Berger, *supra* note 2, at 9; Dunbar, *James Madison and the Ninth Amendment*, 42 VA. L. REV. 627, 635-36 (1956).

6. There is no direct holding on the applicability of the ninth amendment to the states. *Lessee of Livingston v. Moore*, 32 U.S. (7 Pet.) 469, 551-52 (1833), denied generally that the Bill of Rights extended to the states. *See also Barron v. Baltimore*, 32 U.S. (7 Pet.) 242 (1833), decided in the same term. *But see Griswold v. Connecticut*, 381 U.S. 479 (1965); *infra* text accompanying notes 110-25.

7. Justice Reed certainly thought so.

[W]hen objection is made that the exercise of a federal power infringes upon rights

answer proposed will inevitably implicate other areas of constitutional interpretation. Because of the enigmatic nature of the amendment and its helix-like intertwining with other powers and guarantees specified in the Constitution, it is uncommonly difficult to find within it a coherent package of guaranteed rights susceptible to judicial protection without reference to unmanageable, standardless, and amorphous extrinsic sources. Yet, there is a thread that, when followed faithfully, produces a comprehensive, principled, and historically consistent theory of both the content of the ninth amendment and the enforceability of its guarantees.

II. Historical Background

The ninth amendment cannot be properly understood without an appreciation of the historical circumstances which gave rise to its adoption. The Articles of Confederation reflected revolutionary America's deep distrust of centralized authority and strong predilection to retain separate sovereignty for each of the newly independent former colonies. Under the Articles of Confederation, Congress was unable to levy taxes or tariffs and required unanimity of the constituent states to exercise what little authority was vested in it.⁸ As a result, the American "nation" formed by the Articles was fragmented by state jealousies, rival tariffs, artificial barriers to trade, and lack of a national currency or credit.⁹ These conditions effectively plunged the nation into economic depression as well as social and economic isolation.¹⁰

The Constitutional Convention proposed to remedy this situation by

reserved by the Ninth and Tenth Amendments, the inquiry must be directed toward the granted power under which the action of the Union was taken. If granted power is found, necessarily the objection of invasion of those rights, reserved by the Ninth and Tenth Amendments, must fail.

United Pub. Workers v. Mitchell, 330 U.S. 75, 95-96 (1947).

8. 9 JOURNALS OF THE CONTINENTAL CONGRESS 1774-1789, at 90 (P. Ford ed. 1904) [hereinafter JOURNALS]; see also 1 A. BEVERIDGE, LIFE OF JOHN MARSHALL 304 (1916).

9. Examples of protective tariffs enacted by states and directed against their fellow states include Virginia's imposition of duties on articles imported by land or sea and providing for forfeiture upon violation. Va. Stat. at Large, ch. 14, at 46 (1785). Pennsylvania imposed similar duties on American, non-Pennsylvania manufacturers. 1785 Pa. Laws 99.

"The financial situation was chaos." 1 A. BEVERIDGE, *supra* note 8, at 295. Each state issued its own paper currency which was virtually worthless and unacceptable outside its state of issuance. *Id.* at 296. Interstate trade was predictably strangled. New Yorkers discounted New Jersey money at an "unconscionable" rate, 3 J. JAY, CORRESPONDENCE AND PUBLIC PAPERS (H. Johnston ed. 1890), and New Jersey merchants adjusted prices accordingly if buyers tendered New York currency. *Id.* See generally 1 A. BEVERIDGE, *supra* note 8, at 295-311.

10. See generally 1 A. BEVERIDGE, *supra* note 8, at 250-311.

the creation of a strong national government.¹¹ But this radical proposal was not received with anything like acclamation by the early citizens of our nation. In Pennsylvania, for example, the ratification convention was selected by less than ten percent of the eligible voters. This condition came about because the pro-ratification forces called the elections in such a way and on such short notice that, as a practical matter, the citizens of Pennsylvania were disenfranchised in selecting their representatives for the ratification convention.¹² Similarly, in Massachusetts public opinion was so overwhelmingly against the Constitution that some forty-six towns refused to send a delegate to the state ratification convention. Had those forty-six communities been represented, it is a virtual certainty that Massachusetts would have refused to ratify the new Constitution.¹³ In Virginia, perhaps the most pivotal state of all, it was acknowledged that, south of the James River, public opinion was at least nine to one against adoption of the new Constitution.¹⁴ In New York, public opinion was also overwhelmingly against ratification.¹⁵ In all probability, apart from Delaware, Rhode Island, and New Jersey, which regarded the new Constitution as a way of achieving enhanced economic and political leverage,¹⁶ public opinion throughout the original states was substantially opposed to adoption of the new document.¹⁷ Opposition to the Constitution's adoption was rooted in a deep fear of national power.¹⁸ This sentiment, pervasive throughout the early American states, ulti-

11. In writing Washington in April 1787, Madison declared that the national Government should be armed with positive and compleat authority in all cases which require uniformity; such as the regulation of trade Over and above this positive power, a negative *in all cases whatsoever* on the legislative acts of the States, as to heretofore exercised by the Kingly prerogative, appears to me to be absolutely necessary, and to be the least possible encroachment on the State jurisdictions. Without this defensive power, every positive power that can be given on paper will be evaded and defeated. The States will continue to invade the National jurisdiction, to violate treaties and the law of nations & to harass each other with rival and spiteful measures dictated by mistaken views of interest.

2 THE WRITINGS OF JAMES MADISON 345-46 (G. Hunt ed. 1904) (emphasis in original) [hereinafter MADISON WRITINGS]. This ultra-nationalist view sheds light on Madison's real desires when introducing the ninth amendment. See *infra* text accompanying notes 25-31.

12. 1 A. BEVERIDGE, *supra* note 8, at 327.

13. *Id.* at 340 & n.4. Massachusetts ratified the Constitution by a vote of 187 to 168. *Id.* at 348; 2 J. ELLIOT, DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 178-81 (2d ed. 1836).

14. 1 A. BEVERIDGE, *supra* note 8, at 367, 468-70; 3 J. ELLIOT, *supra* note 13, at 587-96; 5 MADISON WRITINGS, *supra* note 11, at 120-22, 302.

15. 1 A. BEVERIDGE, *supra* note 8, at 379.

16. *Id.* at 325.

17. *Id.* at 307-09, 324-25; 5 J. MARSHALL, LIFE OF WASHINGTON 132 (1st ed. 1807).

18. 1 A. BEVERIDGE, *supra* note 8, at 342-47 ("National Government would destroy . . . liberties . . . [and was thought to be] a kind of foreign rule.").

mately compelled proposal and adoption of the first ten amendments to the Constitution.¹⁹ Indeed, ratification was obtained in part by the promise that a bill of rights would be promptly appended to the newly adopted Constitution.²⁰

The purpose of the demanded bill of rights was to provide certainty that the newly created federal government would be disabled from intruding upon the elementary and fundamental rights of the citizenry.²¹ There does not appear to have been disagreement over this objective. Rather, dispute centered upon the wisdom of including any enumeration of rights within the Constitution. Those who preferred the unamended version of the Constitution argued that any enumeration of rights would necessarily be imperfect and would create the inference that no rights existed except those itemized. The federal government possessed only certain enumerated powers, according to this argument, and thus could have no valid claim to interfere with the exercise of the citizens' rights. Adherents to this view, including Alexander Hamilton and James Wilson of Pennsylvania, contended that it was better to imperfectly enumerate the powers of the federal government with the implication that powers not enumerated were reserved to the people, than to attempt an imperfect enumeration of rights reserved to the people, with the implication that rights not so reserved were impliedly delegated to the federal government.²²

The opposition contended that any creation of a government by the people carried with it a delegation to that government of all rights not expressly reserved for the people.²³ Whatever its wisdom, the latter argument was the stronger and, accordingly, James Madison assumed responsibility for introducing into the first Congress constitutional amendments responsive to demands for an articulated bill of rights.²⁴ In an attempt to deal with the concern that any enumeration of rights would imply that the enumeration was exhaustive, Madison introduced his fourth resolution which, after considerable revision, became the ninth amendment:

19. See generally Patrick Henry's two remarkable speeches on the penultimate day of the Virginia convention, June 24, 1788, reprinted in 3 J. ELLIOT, *supra* note 13, at 587-625; see also *infra* notes 26 & 58.

20. 1 ANNALS OF CONG. 464 (J. Gales & W. Seaton ed. 1836) (remarks of Elbridge Gerry) [hereinafter ANNALS OF CONG.].

21. See *infra* note 59.

22. See THE FEDERALIST NO. 84 (A. Hamilton); 2 J. ELLIOT, *supra* note 13, at 436-37.

23. 3 J. ELLIOT, *supra* note 13, at 445-49 (Patrick Henry's remarks urging the Virginia convention to consider issues of fundamental rights before considering ratification of the Constitution).

24. 1 ANNALS OF CONG., *supra* note 20, at 438.

The exceptions here or elsewhere in the Constitution, made in favor of particular rights, shall not be so construed as to diminish the just importance of other rights retained by the people, or as to enlarge the powers delegated by the Constitution; but either as actual limitations of such powers, or as inserted merely for greater caution.²⁵

A close comparison of Madison's resolution and its ancestors²⁶ with the final draft of the ninth amendment reveals a subtle shift of focus. Madison's original resolution contained within it a clause that enjoined interpreters of the Constitution from enlarging the powers delegated by the Constitution to the federal government. This focus on powers is missing in the final version which deals only with the rights retained by the people.²⁷ The tenth amendment provides the focus missing in the

25. *Id.* at 435.

26. Madison's resolution owed much to Virginia's 17th proposed amendment, North Carolina's 18th proposed amendment, the third article of Rhode Island's declaration of rights, and New York's act of ratification. Virginia's 17th proposed amendment provided:

That those clauses which declare that Congress shall not exercise certain powers, be not interpreted, in any manner whatsoever, to extend the powers of Congress; but that they be construed either as making exceptions to the specified powers where this shall be the case, or otherwise, as inserted merely for greater caution.

3 J. ELLIOT, *supra* note 13, at 661. North Carolina's 18th proposed amendment was identical.

4 *Id.* at 246. New York's act of ratification provided:

That the powers of government may be reassumed by the people whensoever it shall become necessary to their happiness; that every power, jurisdiction, and right, which is not by the said Constitution clearly delegated to the Congress of the United States, or the departments of the government thereof, remains to the people of the several states, or to their respective state governments, to whom they may have granted the same; and that those clauses in the said Constitution, which declare that Congress shall not have or exercise certain powers, do not imply that Congress is entitled to any powers not given by the said Constitution; but such clauses are to be construed either as exceptions to certain specified powers, or as inserted merely for greater caution.

1 *id.* at 327. The third article of Rhode Island's declaration of rights, proclaimed as a part of the state's act of ratification, was virtually identical. *Id.* at 336.

Caplan contends that Virginia's 17th proposed amendment is derived from article II of the Articles of Confederation:

Each state retains its sovereignty, freedom and independence, and every power, jurisdiction and right, which is not by this confederation expressly delegated to the United States, in Congress assembled.

9 JOURNALS, *supra* note 8, at 908; see Caplan, *supra* note 2, at 236, 254 n.132.

27. Berger contends that Madison perceived the reservation of rights in the ninth amendment and limitation upon governmental powers in the tenth amendment to be indivisibly related. Berger, *supra* note 2, at 3. Dunbar contends that Madison was attempting to reserve rights while simultaneously preserving power in the central government. Dunbar, *supra* note 5, at 635; see also THE FEDERALIST NO. 44 (J. Madison).

The progenitors of the ninth amendment dealt with limitations of powers. See *supra* note 26; *infra* notes 57-58. Madison's gradual elimination of the original focus of the proposed amendments—restriction of any implication of congressional power beyond the express grant of the Constitution—was consistent with Madison's commitment, at the time, to a strong fed-

ninth on limitation of powers of the federal government.²⁸ This division of powers and rights into separate amendments allows contemporary analysis of the concepts of peoples' rights and governmental powers without reference to each other although the amendments articulate very related concerns.²⁹

Madison conceived of rights as of two varieties. "[T]he great object in view is to limit and qualify the powers of Government, by excepting out of the grant of power those cases in which the Government ought not to act, or to act only in a particular mode."³⁰ Thus, some rights are procedural, delimiting the manner in which the government may exercise its powers. Examples include the right to a trial by jury and due process assurances of notice and opportunity to be heard. Other rights are substantive prohibitions upon the ability of government to exercise its powers at all. For example, Madison thought government should be disabled from any regulation of the press, however abusive its content.³¹ These twin springs of individual rights form the source of the rights preserved by the ninth amendment. Identification of their source, however, does little to solve the problem of defining their content.

eral system. See 1 A. BEVERIDGE, *supra* note 8, at 312; Dunbar, *supra* note 5, at 634-35; *supra* note 11.

28. The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

U.S. CONST. amend X.

29. Madison regarded individual rights and governmental powers as separate and mutually exclusive categories. In a letter to Washington he rejected Edmund Randolph's preference for an amendment limiting the federal government's powers rather than reserving individual rights:

If a line can be drawn between the powers granted and the rights retained, it would seem to be the same thing, whether the latter be secured by declaring that they shall not be abridged, or that the former shall not be extended. If no such line can be drawn, a declaration in either form would amount to nothing.

MADISON WRITINGS, *supra* note 11, at 432. But Madison's observation may have obscured his desire both to retain power in the central government at the expense of the states, see *supra* note 11, and to ensure that the Constitution contained "effectual provisions against the encroachments on particular [individual] rights." 1 ANNALS OF CONG., *supra* note 20, at 433; see also Dunbar, *supra* note 5, at 635; THE FEDERALIST NO. 44 (J. Madison). But see J. ELY, *supra* note 2, at 35-36 (accusing Madison of "confusion" attributable to a "failure to recognize that rights and powers are not simply the absence of one another but that rights can cut across or 'trump' powers."); see also C. BLACK, STRUCTURE AND RELATIONSHIP IN CONSTITUTIONAL LAW (1969), in which Professor Black forcefully illustrates the importance of construing any portion of the Constitution by reference to other portions of the document which set forth the powers and structure of the federal government.

30. 1 ANNALS OF CONG., *supra* note 20, at 454; see also *infra* notes 47 & 82.

31. 4 J. ELLIOT, *supra* note 13, at 567, 571, 573. Madison did acknowledge the common-law power to infringe press freedom by means of actions for libel. *Id.*

III. The Nature of Ninth Amendment Rights

In general, two broad, and contradictory, viewpoints exist concerning the content of the ninth amendment. One maintains that the amendment is a bottomless well from which can be extracted any hitherto unarticulated private right. This view comes in two dimensions: one has its philosophical underpinnings in natural law theories of individual rights;³² the other is a modern construct of activist egalitarians.³³ The contradictory position is that the ninth amendment is merely declaratory of a truth that the people possess unspecified rights.³⁴ This position holds that these "rights" may neither be invaded nor protected by government. As two commentators have put it, the amendment merely declares an area in which government has "no power."³⁵ Or, as another member of this school asserts, "it simply provides that the individual rights contained in state law are to continue in force under the Constitution until modified or eliminated by state enactment, by federal preemption, or by a judicial determination of unconstitutionality."³⁶

Each of these conceptions of the amendment's content is flawed. The notion that the ninth amendment provides a judicially enforceable

32. B. PATTERSON, *THE FORGOTTEN NINTH AMENDMENT* (1955), is perhaps most representative of this genre. Patterson's thesis is that the ninth amendment protects "the inherent natural rights of the individual." *Id.* at 19. Patterson does not identify the source of these rights; presumably he finds them in natural law theories of immutable and inalienable rights. Although this may be a theoretical source, as Dunbar suggests, "they could just as well be ascribed to the doctrine of 'the rights of Englishmen,' or to the consensus of the American people." Dunbar, *supra* note 5, at 640; see *infra* text accompanying notes 75-81. Professor Corwin argues that the ninth amendment illustrates natural law theories and contends that the Constitution would not be "regarded as complete" without recognition of transcendental rights. Corwin, *The "Higher Law" Background of American Constitutional Law* (pt. 1), 42 HARV. L. REV. 149, 153 (1928); see also Towe, *Natural Law and the Ninth Amendment*, 2 PEPPERDINE L. REV. 270 (1975); Van Loan, *Natural Rights and the Ninth Amendment*, 48 B.U.L. REV. 1 (1968).

33. See, e.g., C. BLACK, *supra* note 2, at 44-68; J. ELY, *supra* note 2, at 34-41; L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 570 (1978); Gibbons, *supra* note 2, at 272-73; Henkin, *Infallibility Under Law: Constitutional Balancing*, 78 COLUM. L. REV. 1022, 1043 (1978); Kent, *Under the Ninth Amendment What Rights Are the "Others Retained by the People?"*, 29 FED. B.J. 219 (1970); Moore, *The Ninth Amendment—Its Origins and Meaning*, 7 NEW ENG. L. REV. 215 (1972); Paust, *Human Rights and the Ninth Amendment: A New Form of Guarantee*, 60 CORNELL L. REV. 231 (1975); Perry, *Interpretivism, Freedom of Expression, and Equal Protection*, 42 OHIO ST. L.J. 261, 272-73 (1981); Ringold, *The History of the Enactment of the Ninth Amendment and Its Recent Developments*, 8 TULSA L.J. 1 (1972).

34. See, e.g., M. GOODMAN, *THE NINTH AMENDMENT* (1981); Berger, *supra* note 2; Bork, *The Impossibility of Finding Welfare Rights in the Constitution*, 1979 WASH. U.L.Q. 695, 697; Caplan, *supra* note 2; Dunbar, *supra* note 5; Monaghan, *supra* note 2, at 365-67; Van Alstyne, *supra* note 2.

35. Berger, *supra* note 2, at 9; Dunbar, *supra* note 5, at 641.

36. Caplan, *supra* note 2, at 228.

constitutional guarantee for individual inherent rights seemingly involves the courts in an open-ended exercise in noninterpretive judicial review.³⁷ To the extent that this activity would further erode public support for the judiciary, lasting damage to the fragile balance of power in our tripartite system might be incalculable.³⁸ The efficacy of judicial review is dependent upon public acquiescence.³⁹ To endanger this keystone principle by foraging for inherent rights among the moral controversies of the day would seem to be foolhardy indeed. Those who urge the judiciary to use the ninth amendment as a catapult for extending constitutional protection to all manner of personal preference no doubt believe that the result will be an expansion of personal liberty. But should the judicial role as bulwark against majoritarian excesses⁴⁰ be ruptured by this aggressive strategy, a far more likely result will be a shrinkage of human liberty. Moreover, once license is granted to incorporate extrinsic values into the ninth amendment, there is no easy way to limit such imported values to those expansive of personal liberty.⁴¹ Even Dean Ely, an advocate of this view, admits that the amendment "seems open-textured enough to support almost anything one might wish to argue, and that can get pretty scary."⁴²

Exclusive reliance upon natural law provides an uncertain buoy for those adrift in the sea of "open texture." Natural law theories of human

37. See generally M. PERRY, *THE CONSTITUTION, THE COURTS AND HUMAN RIGHTS* (1982). Perry defines noninterpretive review as judicial review which does not engage in interpretation of the Constitution itself, but which uses wholly extrinsic sources to find or make law. These extrinsic sources may be as fleeting as current public opinion or as nebulous as the sitting justices' private subjective values. *Id.* at 37-60. By contrast, interpretive review seeks legitimacy by deriving law from the constitutional text. *Id.* at 61-90.

38. Consider the periodic attempts to strip the federal courts of jurisdiction to hear cases involving school prayer, school busing, or any other area in which the courts have rendered unpopular decisions. See *Ex parte McCordle*, 74 U.S. (8 Wall.) 506 (1868) (in which Congress successfully stripped the Supreme Court of appellate jurisdiction over reconstruction actions of the military authorities); A. COX, *THE ROLE OF THE SUPREME COURT IN AMERICAN GOVERNMENT* 99-118 (1976); P. MURPHY, *CONGRESS AND THE COURT* (1962); L. TRIBE, *CONSTITUTIONAL CHOICES* 47-65 (1985). For an unequivocal assertion of congressional power over federal court jurisdiction, see C. BLACK, *supra* note 2, at 17-19, 37-39.

39. A. COX, *supra* note 38, at 103-18; A. BICKEL, *THE LEAST DANGEROUS BRANCH* (1962).

40. A. BICKEL, *supra* note 39, at 16-23.

41. For example, the ninth amendment could be read as preservative of *Lochner*-era individual inherent rights. See *Lochner v. New York*, 198 U.S. 45 (1905). One commentator would probably do just that. See B. PATTERSON, *supra* note 32, at 58, where he reveals his belief that the inherent rights protected by the ninth amendment consist, in part, of individual "protection" against public assistance and other governmental transfer payments. Those Americans who owe their continued existence to public assistance would be surprised to learn that their ninth amendment rights were thereby violated.

42. J. ELY, *supra* note 2, at 34.

rights have been criticized as sufficiently indeterminate to provide little guidance within the boundless dimensions of the ninth amendment as seen by the expansionists.⁴³ Indeed, the modern activist egalitarians reject natural law foundations for their open-ended interpretation⁴⁴ though it is not historically accurate to do so.⁴⁵ The American Revolution had its intellectual underpinnings in Lockean theory,⁴⁶ and the constitutional framers, though not fettered by natural law, clearly relied upon natural law principles in formulating constitutional guarantees.⁴⁷ Though there is little intimation in the 175 years prior to *Griswold v. Connecticut*⁴⁸ that the ninth amendment was thought to be a repository of natural law,⁴⁹ its

43. See Towe, *supra* note 32, at 273-74 (collecting arguments asserting that natural law arguments are impossible to prove and merely provide a euphemistic disguise for naked subjective preferences).

44. See J. ELY, *supra* note 2, at 50. ("[Y]ou can invoke natural law to support anything you want."); cf. C. BLACK, *supra* note 2, at 44, 49 (advocating an expansive reading of the ninth amendment based on the utilitarian principle of facilitating judicial outcomes not otherwise attainable).

45. See *infra* notes 82-85 and accompanying text.

46. Lockean theory posits that men are born into a "state of nature," without government, and agree out of "strong obligations of necessity, convenience and inclination" to constitute governments. The social contract thus made necessarily involves parting with some individual (natural) rights in order to secure the remainder more effectively. J. LOCKE, TWO TREATISES OF GOVERNMENT § 77, at 336-37 (P. Laslett 2d ed. 1967) (3d ed. 1698). Lockean theory was generally accepted by such esteemed commentators as Blackstone. 1 W. BLACKSTONE, COMMENTARIES *42-44, *121-22; see also *infra* notes 50-57 & 198-200 and accompanying text.

47. Though the framers distinguished between natural law and positive law, they were anything but meticulous in maintaining that distinction when debating the necessity of a Bill of Rights. Madison identified freedom of speech as a natural right but trial by jury as a positive right, resulting from the social compact. 5 MADISON WRITINGS, *supra* note 11, at 389 & n.1; 1 ANNALS OF CONG., *supra* note 20, at 454. More importantly, Madison concluded that the positive or civil right to a jury trial was "as essential to secure the liberty of the people as any one of the pre-existent rights of nature." *Id.* at 454. In urging adoption of a Bill of Rights, both George Mason and Patrick Henry referred to "great and important" rights of humanity, without neatly dividing them into natural and positive categories. 3 J. ELLIOT, *supra* note 13, at 317, 444; cf. *infra* note 129.

48. 381 U.S. 479 (1965).

49. None of the seven cases prior to *Griswold* carry any suggestion that the ninth amendment raised natural law notions of individual rights to the level of a constitutional guarantee. See cases cited *supra* note 1. Indeed the cases seem to adumbrate a rule confining the ninth amendment to hortatory dimensions.

[Moreover,] were the amendment ever to be adopted into the armory of natural law, one would have expected it to have occurred in such classic connections as the opinion of Chase, J., in *Calder v. Bull*, 3 U.S. (3 Dall.) 386 (1798), or in the argument of former Justice Campbell in *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36 (1872), or in the opinion of Miller, J., in *Loan Ass'n v. Topeka*, 87 U.S. (20 Wall.) 655 (1874). But it does not, not even when Mr. Justice Miller in the later case speaks of "Implied reservations of individual rights, without which the social compact could not exist, and which are respected by all governments entitled to the name." *Id.* at 663.

foundation in Lockean political theory requires an understanding of those actuating notions.

Writing as rough contemporaries in the seventeenth century, John Locke and Thomas Hobbes found different answers to a common problem. Hobbes, the defender of absolute sovereign power, regarded humans as uniformly selfish in a world without external authority to restrain their passions. Accordingly, life in this condition was "solitary, poore, nasty, brutish and short."⁵⁰ To escape this gloomy fate and to acquire security and order, Hobbes would exact a price consisting of the surrender of liberty and property to an absolute sovereign. While the individuals in this Hobbesian social contract would be somewhat better off, the big winner from this exchange would no doubt be the sovereign. Being a legal monopolist, the sovereign would exact monopoly rents—most of the benefits of political union would be expropriated by and for the sovereign.

Locke, by contrast, sought to devise a set of institutional arrangements which would allow individuals to escape the perils of social disorder without having to surrender their entire stock of individual rights. His goal was to vest the individuals composing the society with all the benefits created by political union. Locke's sovereign was to be prevented from expropriating the benefits of the social contract. To accomplish this, Locke posited that the sovereign merely succeeded to the private rights given up to it by the contracting individual members of society. Thus, the state itself had no claim to new and independent rights as against the persons under its control. As a modern commentator has put it: "The state can acquire nothing by simple declaration of its will but must justify its claims in terms of the rights of the individuals whom it protects."⁵¹ Of course, since "the central purpose of government is to maintain peace and order within the territory,"⁵² the Lockean sovereign succeeds to private rights of self-defense in order to curb illegitimate, power-based intrusions upon the rights of others.⁵³ This police power

Dunbar, *supra* note 5, at 640 n.47; see also Caplan, *supra* note 2, at 261 n.158. It is possible, as Dunbar indicates, that these cases did not recognize the ninth amendment as a repository of natural law because they involved state, rather than federal, action.

50. T. HOBBS, *LEVIATHAN* ch. 13 (1651).

51. R. EPSTEIN, *TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN* 12 (1985).

52. *Id.* at 16.

53. An apt illustration of this principle is to be seen in the interplay of the law relative to possession of and trespass upon real property. At early common law, the essence of possession was the legal concept of the right of "seisin," a term connoting "peace and quiet." 2 F. POLLOCK & F. MAITLAND, *THE HISTORY OF ENGLISH LAW BEFORE THE TIME OF EDWARD I*, at 29-30 (2d ed. 1959). To vindicate this right, the law of trespass was created. Since allowing

attribute of sovereignty insures that the state can effectively provide peace and order to the individual members of the society but, critically, the power's theoretical outer limits are the limits of self-defense in private hands. The state cannot prohibit what could not legitimately be resisted or prohibited by private action prior to the Lockean compact.

Lockean thought was the dominant political theory at the time of the Constitution's adoption.⁵⁴ Constitutional limitations upon the federal government's power and express diffusion of its exercise were intended to guarantee the liberties of the individuals forming the society by dividing the potential power of the state to seize those liberties for itself.⁵⁵ The Constitution specifies precise measures to divide and check the exercise of power but is generally silent about protection of individual substantive rights. The elaborate devices created to limit power were, of course, intended to serve some substantive end. The procedural safeguards in the original Constitution implicitly protected against encroachments upon individual entitlements. It was for this reason that Hamilton and Wilson opposed adoption of the Bill of Rights.⁵⁶ With this conceptual understanding it is possible to see the function to be discharged by the Bill of Rights. It "identifies the ends of government, the rights that the system of limited jurisdiction, indirect voting, and separation of power is designed to protect."⁵⁷ It is this theoretical substantive end which the ninth amendment was intended to serve that must be kept in mind when examining its specific content.

Construing the ninth amendment as a mere declaration of a constitutional truism, devoid of enforceable content, renders its substance nugatory and assigns to its framers an intention to engage in a purely moot exercise. This view is at odds with the contextual historical evidence⁵⁸

"men to make forcible entries on land . . . is to invite violence," the trespass laws' protection of possession "is a prohibition of self-help in the interest of public order." *Id.* at 31, 41.

54. Not only did Blackstone adopt the Lockean theory of the state, *see supra* note 46, but the constitutional framework of limited and separated powers provides evidence of intent to disable the sovereign from seizing the benefits of political union. *See* R. EPSTEIN, *supra* note 51, at 16; Corwin, *The "Higher Law" Background of American Constitutional Law* (pt. 2), 42 HARV. L. REV. 365, 394-409 (1929).

55. Locke desired a separation of executive and legislative functions. J. LOCKE, *supra* note 46, §§ 143-144, at 382-83. Montesquieu is generally credited with the doctrine of separation of powers. 1 C. MONTESQUIEU, *THE SPIRIT OF THE LAWS*, bk. 11, at 149-51 (1748).

56. *See supra* text accompanying notes 21-22.

57. R. EPSTEIN, *supra* note 51, at 18.

58. *See supra* text accompanying notes 8-24. Too much cannot be made of the public opposition to the Constitution's adoption. It was this opposition, which viewed the central government as "foreign," that compelled the first Congress to propose the Bill of Rights. *See, e.g.,* Elbridge Gerry's assertion in Congress:

[A] great body of our constituents opposed the Constitution as it now stands, . . .

and the specific, articulated concerns of its framers,⁵⁹ and violates the premise of *Marbury v. Madison* that the Constitution contains judicially discoverable and enforceable principles.⁶⁰

If the ninth amendment merely declares certain areas to be off limits for the exercise of the federal government's power, by what mechanism is that government to be prevented from ignoring its constitutionally defined boundaries? Berger contends that ninth amendment rights are not judicially enforceable because they do not arise under the Constitution but find their source wholly outside the Constitution.⁶¹ This conclusion is premised, in part, upon the language chosen by Madison for introducing the ninth amendment in the House of Representatives.⁶² Madison asserted that if the Bill of Rights were

incorporated into the Constitution, independent tribunals of justice will consider themselves in a peculiar manner the guardians of those rights; they will be an impenetrable bulwark against every assumption of power in the legislative or executive; they will be naturally led to resist every encroachment upon rights expressly stipulated for in the constitution by the declaration of rights.⁶³

Berger contends that Madison's assertion, coupled with his belief that constitutional opponents were motivated in their opposition by the absence in the Constitution of "effectual provisions against encroachments on particular rights,"⁶⁴ is a sure indicator that only the specified

[and] are apprehensive of the enormous power of [the federal] Government. . . . The ratification of the Constitution in several states would never have taken place had they not been assured that the objections would be duly attended to by Congress.

1 ANNALS OF CONG., *supra* note 20, at 446-47; *see also supra* note 18.

59. The draftsmen of the ninth amendment knew what they were about: limiting the delegated powers of the federal government.

This declaration of rights, I take it, is intended to secure the people against the maladministration of the [new central] government.

1 ANNALS OF CONG., *supra* note 20, at 749 (remarks of Elbridge Gerry). Even the nationalist Madison admitted that "the abuse of powers of the General Government may be guarded against in a more secure manner than is now done [by the unamended Constitution]." *Id.* at 449-50.

60. 5 U.S. (1 Cranch) 137, 166-67, 177-78 (1803); *see also* L. TRIBE, *supra* note 33, at 20-23 (Constitution contains principles enforceable through judicial review); H. WECHSLER, *PRINCIPLES, POLITICS AND FUNDAMENTAL LAW* 4-10 (1961) (contending that Constitution's status as supreme law demands that it contain discoverable, enforceable values); Scharpf, *Judicial Review and the Political Question: A Functional Analysis*, 75 YALE L.J. 517, 517-19 (1966); Van Alstyne, *A Critical Guide to Marbury v. Madison*, 1969 DUKE L.J. 1, 16-29 (surveying arguments advanced by Chief Justice Marshall in *Marbury* for judicial review).

61. Berger, *supra* note 2, at 9.

62. *Id.* at 8; *see supra* text accompanying note 26.

63. 1 ANNALS OF CONG., *supra* note 20, at 440.

64. *Id.* at 433.

rights were to be judicially enforced.⁶⁵ Rights were enumerated solely to make them susceptible of judicial enforcement. The inevitable corollary conclusion to this proposition is that ninth amendment rights, whatever their substance, are not capable of judicial enforcement. As a practical matter, then, they may be freely invaded by a Congress vigorously exercising its express or implied powers.⁶⁶ This conclusion meets an immediate and formidable obstacle in the language of the ninth amendment itself. If the reserved rights are not to be denied or disparaged by the enumeration of other rights, but only the enumerated rights may be judicially enforced, the reserved rights necessarily shrivel. If this is not disparagement, or "impairment" as Elbridge Gerry would have preferred,⁶⁷ then the concept has been drained of all meaning.

Moreover, Berger makes too much of "Madison's disclaimer of intention 'to enlarge the powers delegated by the Constitution' by nonenumeration of 'other rights.'"⁶⁸ Madison's fourth resolution sets forth a rule of construction that enumeration of rights should "not be construed as to . . . enlarge the powers delegated by the constitution; but either as actual limitations of such powers, or as inserted merely for greater caution."⁶⁹ Madison's language readily supports the conclusion that the ninth amendment cannot be used as a springboard for enabling Congress, under Article I, section 8,⁷⁰ to create additional rights.⁷¹ But

65. Berger, *supra* note 2, at 8-9; cf. Dunbar, *supra* note 5, at 643 (judicial enforcement is the practical effect of enumeration; ninth amendment rights are defensible only through political action).

66. When the rule of *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819), the supremacy clause, the post-1937 expansion of the commerce clause, and the attenuation of the tenth amendment are read together, an interpretation of the ninth amendment which denies judicial enforcement of those rights "retained by the people" is the amendment's death sentence. That, perhaps, is the logical extension of the evolution of constitutional jurisprudence in a direction which dismisses federalism as an antiquarian relic to be discarded for lack of modern relevance. A comprehensive treatment of federalism, setting forth a modern federal theory, is beyond the scope of this article. For ninth amendment rights to have real flesh, whether one subscribes to Berger's view of enforceability or to the view set forth in the text accompanying note 58 above to note 74 below, may require a radical change of thought in constitutional interpretation concerning the proper scope of the powers of Congress, at least with respect to the states.

67. 1 ANNALS OF CONG., *supra* note 20, at 754.

68. Berger, *supra* note 2, at 8; see also *supra* text accompanying notes 62-63.

69. 1 ANNALS OF CONG., *supra* note 20, at 435.

70. U.S. CONST. art. I, § 8 enumerates the powers delegated to Congress and concludes with a grant of power to Congress

To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.

71. Both Berger, a principal advocate of a limited, declaratory reading of the ninth amendment, and Ely, an activist egalitarian, agree on this point. Berger, *supra* note 2, at 8-10;

delegated powers are not enlarged by treating the ninth amendment's declaration of reserved rights to be, itself, a constitutional right. The amendment is, after all, a part of the Constitution and declares its purpose to be to prevent denial or disparagement of its unspecified rights. It would be richly ironic to find this piece of the constitutional text undeserving of judicial protection, for it would declare the principle that the rights thereby reserved were simply reserved for oblivion whenever the federal government chose to eradicate or ignore them.⁷² Rather, proceeding from the familiar maxim, "for every wrong there is a remedy,"⁷³ it would seem logical to assume the existence of some enforceable remedy whenever the federal government exceeds its delegated powers by invading a reserved right. This remedy, of course, can have meaning only to the extent that the ninth amendment has substantive sources or content discernible by principled means of interpretation not reliant upon the importation of wholly subjective values.⁷⁴

In drafting the ninth amendment, surely its authors had in mind some bundle of rights worthy of constitutional protection. Perhaps the surest indication of the kind of rights with which they were concerned lies in the fact that the ninth amendment was proposed, considered, and adopted as a part of the Bill of Rights.⁷⁵ This was no accident; it was the logical product of a century and a half of colonial government. From the

J. ELY, *supra* note 2, at 37. Madison's disclaimer, coupled with the explicit text of the necessary and proper clause, disposes of any such notion.

72. By inference, Caplan would seem to adopt this topsy-turvy view. He contends that the ninth amendment merely perpetuates any individual rights rooted in state law until "eliminated . . . by federal preemption." Caplan, *supra* note 2, at 228. Caplan relies on the supremacy clause, U.S. CONST. art. VI, cl. 2, for this conclusion.

Of course, there are constitutional guarantees that escape judicial review by application of the murky doctrine of nonjusticiability. See, e.g., the guarantee clause, U.S. CONST. art. IV, § 4, cl. 1 ("The United States shall guarantee to every State in this Union a Republican Form of Government. . . ."). Since *Luther v. Borden*, 48 U.S. (7 How.) 1 (1849), the guarantee clause has been consigned to this constitutional purgatory. L. TRIBE, *supra* note 33, § 3-16. But see Note, *The Rule of Law and the States: A New Interpretation of the Guarantee Clause*, 93 YALE L.J. 561 (1984); *infra* text accompanying notes 118-25; see also *Ludecke v. Watkins*, 335 U.S. 160, 168-70 (1948) (refusal to determine the duration of a state of war); *Clark v. Allen*, 331 U.S. 503, 514 (1947) (refusal to determine whether treaty abrogated); *Coleman v. Miller*, 307 U.S. 433 (1939) (refusal to determine whether a state has properly ratified a constitutional amendment). It is possible that the tenth amendment has also slipped into this nether world. See *Garcia v. San Antonio Metro. Transit Auth.*, 105 S. Ct. 1005 (1985).

73. CAL. CIV. CODE § 3523 (West 1984). Maxims of jurisprudence and rules of statutory construction are not inapplicable when wrestling with constitutional meaning. See Berger, "Government by Judiciary": Judge Gibbons' Argument *Ad Hominem*, 59 B.U.L. REV. 783, 804-06 (1977) (citing eminent jurists and commentators who believe such canons to be applicable to constitutional interpretation).

74. See *supra* notes 37-42 and accompanying text.

75. Divining meaning from constitutional text by its context and from structurally re-

beginning of English settlement in North America, colonists believed themselves the equals of native Englishmen and entitled to the "rights of Englishmen" as established by English statutory and common law.⁷⁶ The colonists did not believe these were static rights but asserted them to be capable of limitation, amplification, or revision by their colonial legislatures.⁷⁷ Moreover, they did not wholly trust the English statutory enactments, preferring to enact existing guarantees as part of colonial organic law.⁷⁸ Accordingly, during the Virginia ratification debates, Patrick Henry declared that George Mason's 1776 Virginia Bill of Rights "secures the great and principal rights of mankind," such "rights of the people" being those secured by English and American statutory law and the common law of England as imported to America.⁷⁹ A federal Bill of Rights, then, was a plain statement of these great and principal rights of mankind. It was not an exhaustive list; the ninth amendment reminds us of this fact.

Since the source of the first eight amendments was the inherited "rights of Englishmen" as adapted to colonial circumstances and secured by state charters and statutes, it would seem a safe point of departure to assume that the unenumerated rights of the ninth amendment were intended to be the remaining such "rights of Englishmen." But, of course, after successful revolt from British rule, Americans possessed only rights of Americans. To be sure, the rights of Americans might have a source in the traditional fount of common law but, to the extent such rights

lated constitutional concepts is at the heart of Professor Black's thesis. See C. BLACK, *supra* note 29, at 3-32.

76. T. CURRY, *THE FIRST FREEDOMS* 64, 66 (1986); see also 1 BLACKSTONE, *COMMENTARIES* *63-64, *104-05, *123-24. Among the important statutory sources of the "rights of Englishmen" were the Magna Carta (1215), Petition of Rights (1628), Habeas Corpus Act (1679), Declaration of Rights (1689), Toleration Act (1689), Mutiny Act (1689), and Settlement Act (1701). See generally F. McDONALD, *NOVUS ORDO SECLORUM: THE INTELLECTUAL ORIGINS OF THE CONSTITUTION* 9-55 (1985); H. TAYLOR, *THE ORIGIN AND GROWTH OF THE AMERICAN CONSTITUTION* 230-43 (1911).

77. See, e.g., Maryland Declaration of Rights (1776), reprinted in 3 *FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS AND OTHER ORGANIC LAWS* 1686 (F. Thorpe ed. 1909) [hereinafter *FEDERAL AND STATE CONSTITUTIONS*].

78. The Magna Carta established that personal liberty and private rights to property were beyond the royal grasp and could be taken only as provided by the law of the land. This early statement of due process had been confirmed by Parliament in 1773. Cf. 1 BLACKSTONE, *COMMENTARIES* *137-38. (Since Blackstone's first edition was published in 1765, it contains no reference to the 1773 statutory enactment. Later editions contain the reference. See, e.g., *id.* at *139-40 (J. Chitty ed. 1826).) It had also been incorporated into Maryland law (1639), Massachusetts' Body of Liberties (1641), the West New Jersey Charter (1676), New York's "Charter of Liberties and Privileges" (1683), and even the Northwest Ordinance (1787). 5 *FEDERAL AND STATE CONSTITUTIONS*, *supra* note 77, at 2549.

79. 3 J. ELLIOT, *supra* note 13, at 461, 513, 587-88.

were of statutory dimension, the relevant statutes were those enacted by the states.⁸⁰ Indeed, the sentiment of many of the framers was to look to the states as the source of protection of their cherished liberties.⁸¹ It was this source that was drawn upon to compose a federal Bill of Rights.

This stream of rights had two branches. The framers understood and observed a distinction between "natural" rights and "civil" or "positive" rights.⁸² Positive rights had their source in state common, constitutional, and statutory law; natural rights stemmed from Lockean notions concerning the "unalienable"⁸³ rights of the people. But, because both forms were considered to be "essential to secure the liberty of the people,"⁸⁴ the package of rights expressly enumerated in the first eight amendments contains both natural and positive rights.⁸⁵ It is a fair inference, then, that the unenumerated rights of the ninth amendment were thought to consist of both varieties. If this be so, the distinction between "natural" and "positive" rights cannot account for the selection of the rights worthy of enumeration in the first eight amendments. Some other rationale must be supplied for the specification of those rights, else we reach the unlikely conclusion that the thoughtful, learned framers were actuated by caprice.

The framers enumerated certain rights for a purpose other than in-

80. Caplan makes a persuasive case that the ninth amendment was intended only to preserve from federal encroachment rights secured by state law. See Caplan, *supra* note 2, at 228-59. He concludes that "the ninth amendment embraces those individual liberties protected by state laws." *Id.* at 265.

81. Oliver Ellsworth, for example, trusted "for the preservation of his rights to the State Govts. From these alone he could derive the greatest happiness he expects in this life." 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 492 (M. Farrand ed. 1937) [hereinafter RECORDS]. In recommending against inclusion of a Bill of Rights in the Federal Constitution, Roger Sherman declared: "The State Declarations of Rights are not repealed by this Constitution; and being in force are sufficient." 2 *id.* at 588. James Wilson asserted in 1791 that "our [colonial] assemblies were chosen by ourselves: they were the guardians of our rights, the objects of our confidence, and the anchor of our political hopes." 1 WORKS OF JAMES WILSON 292 (R. McCloskey ed. 1967).

82. Madison perceived a distinction between natural rights, "those rights which are retained when particular powers are given up to be exercised by the Legislature," and positive rights, those which "may seem to result from the nature of the compact." 1 ANNALS OF CONG., *supra* note 20, at 954; see *supra* note 47. This distinction was also seen by Blackstone. 1 BLACKSTONE, COMMENTARIES *42-44, *121-22. Indeed its roots can be traced to Aristotle. See Caplan, *supra* note 2, at 237 n.55.

83. See 1 THE BILL OF RIGHTS: A DOCUMENTARY HISTORY 349 (B. Schwartz ed. 1971); The Declaration of Independence para. 1 (U.S. 1776) ("We hold these Truths to be self-evident, that all Men are . . . endowed by their Creator with certain unalienable rights . . .").

84. 1 ANNALS OF CONG., *supra* note 20, at 454 (Madison's remarks).

85. See *supra* note 47. Compare U.S. CONST. amend. I (freedom of speech, a natural right) with U.S. CONST. amend. VII (trial by jury, a positive right).

sureing their judicial enforceability.⁸⁶ Madison observed, when introducing the Bill of Rights in Congress, that it was necessary to enumerate certain rights of the people because some states had no bill of rights and other states' declarations were defective.⁸⁷ Moreover, Madison was unwilling to rely on natural law as wholly preservative of the peoples' liberties:

It would be a sufficient answer to say, that this objection lies against such provisions [declarations of rights] under the State Governments, as well as under the General Government; and there are, I believe, but few gentlemen who are inclined to push their theory so far as to say that a declaration of rights in those cases is either ineffectual or improper.⁸⁸

Rights were enumerated in the federal Constitution to provide a clear barrier to federal action;⁸⁹ the specific guarantees selected for enumeration were derived from similar specific guarantees then in existence under state charters, constitutions, or declarations of rights.⁹⁰ The inclusion of the ninth amendment was, in part, an attempt to be certain that rights protected by state law were not supplanted by federal law simply because they were not enumerated.⁹¹ But the ninth amendment was intended to do more than secure unenumerated state-based rights from federal invasion; it was also to serve as a barrier to encroachment upon natural rights retained by the people.⁹²

Thus, the ninth amendment protects two distinct categories of rights: positive rights, having their source in state law, and natural

86. Madison undoubtedly thought enumeration would lead to judicial enforceability. See *supra* text accompanying notes 62-63. Yet, he also entertained larger hopes for the entire Bill of Rights. "The political truths declared in that solemn manner acquire by degrees the character of fundamental maxims of free Government, and as they become incorporated with the national sentiment, counteract the impulses of interest and passion." 5 MADISON WRITINGS, *supra* note 11, at 273. One of those political truths for which Madison held such high hopes was that unenumerated rights retained by the people were of equal constitutional dignity with the specified rights.

87. 1 ANNALS OF CONG., *supra* note 20, at 452; see also *infra* text accompanying note 121.

88. 1 ANNALS OF CONG., *supra* note 20, at 455.

89. See *supra* note 59.

90. See *supra* note 87 & *infra* note 121.

91. See Caplan, *supra* note 2, at 254.

92. Madison feared that enumeration of rights "would disparage those rights which were not placed in that enumeration; and it might follow, by implication, that those rights which were not singled out, were intended to be assigned into the hands of the General Government, and were consequently insecure." 1 ANNALS OF CONG., *supra* note 20, at 456. This inference could be "guarded against" by the ninth amendment. *Id.* The fact that Madison had the same fear with respect to state bills of rights indicates that he appreciated that certain rights were "natural [and] . . . retained by the people," 5 MADISON WRITINGS, *supra* note 11, at 390 & n.1, and were properly beyond the powers of government.

rights, grounded in conceptions of inalienable rights of man.⁹³ The difference compels differing analytical treatment of their content and enforceability. If the reserved positive rights of the ninth amendment may be determined by reference to state law, either existing in 1788 or later created, there is no genuine theoretical obstacle to their judicial enforcement. Concern that the substance of these rights is so amorphous as to endanger the validity of the judicial process by license to import subjective personal values is eliminated by looking only to state law to provide the boundaries of reserved positive rights. Unfortunately, judicial enforcement of reserved natural rights implicates precisely these concerns.⁹⁴

IV. Positive Rights

Application of state law positive rights, secured by the ninth amendment, as a barrier to action by the federal government poses substantial apparent conflict with the supremacy clause.⁹⁵ However, once it is conceded that the state-based rights guaranteed by the ninth amendment are federal rights, the conflict partially vanishes, for the rights preserved are federal in character though state in origin. This starting point finds support in the amendment's text, which enjoins a construction of the Constitution that would "deny or disparage" the unenumerated rights. To conclude that ninth amendment rights are capable of invasion by means of the supremacy clause⁹⁶ is to both deny and disparage them, for no one contends that the rights secured by the first eight amendments may be preempted by simple congressional action.⁹⁷

93. This division is wholly consistent with Madison's conception of rights as procedural, or positive, and substantive, or natural. *See supra* notes 30-31 and accompanying text.

94. *See infra* notes 126-32 and accompanying text.

95. This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

U.S. CONST. art. VI, cl. 2. Supremacy clause problems are confined to evaluation of ninth amendment positive rights. Since the source of natural rights lies in conceptions of inalienable rights of the people not transferable to government upon making the social compact, such rights do not present any state challenge to federal authority. *See supra* text accompanying notes 30-31 & 54-55; *infra* notes 128-32.

96. *See supra* notes 7 & 72.

97. This is the fundamental error of Justice Reed in *United Pub. Workers v. Mitchell*, 330 U.S. 75, 95-96 (1947); *see supra* note 7. By assuming that the ninth amendment can be invaded by congressional action and that the first eight amendments cannot, Justice Reed made a distinction fatally disparaging to ninth amendment rights. Unless its text be ignored, the ninth amendment forbids the distinction.

Even though ninth amendment positive rights are federal in character, their state origin poses practical problems in finding a comfortable fit between the supremacy clause and the ninth amendment. Two extreme alternatives may be quickly dismissed. First, Congress could be conceded the power to preempt a state-based ninth amendment right. As discussed above, this conclusion repudiates the amendment's text and ignores whatever effect the later amendment may have been intended to have on the earlier supremacy clause. Second, Congress could be denied any power to preempt a state-based ninth amendment right under any circumstances. While this conclusion would elevate ninth amendment rights to equal status with the enumerated rights, a result commanded by the amendment itself, it raises an ugly specter of back-door nullification. If congressional action can be effective only if the states implicitly consent by their failure to enact contrary legislation (which would provide a source for the federal rights reserved by the ninth amendment) the ghost of John C. Calhoun has arisen in a new and powerful form.⁹⁸ This would be a disturbing and radical result at odds with much of American history and the settled understanding of the proper place of the states and Congress.

Can there be any rationally explicable middle ground? The fundamental problem is to differentiate among state rights in a way that does not "deny or disparage" ninth amendment rights. The understanding of the ninth amendment's framers provides a helpful departure for formulation of a usable standard. The framers were unwilling to declare in the Constitution that common law, or even state law, remained in effect because they thought that to do so would freeze the common law at the date of its adoption, thereby preventing that highly organic mechanism from undergoing further change.⁹⁹ Rufus King also thought that constitutional guarantees of state law would prevent the states from later altering their laws.¹⁰⁰ The common law was in an anomalous position: it was

98. Calhoun, of course, as Vice-President in Andrew Jackson's first term, originated the doctrine of nullification in response to the Tariff of 1828. He asserted the constitutional right of a state to void federal law within its own borders whenever the state independently determined such law to be unconstitutional. Following enactment of the Tariff of 1832, South Carolina's enthusiastic adoption of nullification with respect to application of the tariff in South Carolina threatened the continued existence of the Union. See generally R. REMINI, *ANDREW JACKSON AND THE COURSE OF AMERICAN FREEDOM, 1822-1832*, at 137, 160, 232-37, 381, 387-89 (1981); R. REMINI, *ANDREW JACKSON AND THE COURSE OF AMERICAN DEMOCRACY, 1833-1845*, at 8-44 (1984).

99. 3 J. ELLIOT, *supra* note 13, at 450-51 (G. Nicholas, Virginia), 469-70 (E. Randolph, Virginia).

100. In the Massachusetts ratification convention, King declared that "if the present con-

"not excluded"¹⁰¹ but neither was it "understood to be a law of the United States."¹⁰² It was not expressly adopted, for to do so would mummify it in place; it was not excluded because, when all was said and done, it was still a source of the "great and principal rights of mankind."¹⁰³ Clearly, the framers intended to permit the later evolution of common and statutory law within the several states. Simultaneously, in adopting the ninth amendment, they preserved the constitutionally guaranteed dignity of personal rights which have their source in such state laws.¹⁰⁴

Two principles then suggest themselves as possible alternative vehicles for sorting out the claims of a state-based ninth amendment right when they conflict with otherwise legitimate federal legislative action. First, if the asserted federal ninth amendment right is predicated upon state action taken prior to the Constitution's adoption,¹⁰⁵ the claimed ninth amendment right is secured against congressional invasion. This conclusion finds support in the general fear of federal encroachment that prompted adoption of the ninth amendment—not all of the great and principal rights of man were specified in the first eight amendments; failure to preserve inviolate the unspecified rights would hazard them to loss by action of an aggressive central government.¹⁰⁶ If the ninth amendment was to preserve against federal action unspecified rights whose source was in state constitutional, common, or statutory law it is readily inferable that the framers intended thereby to displace the federal preemptive power, at least with respect to ninth amendment rights which could be identified by reference to then existing state sources.

A second, and more radical, alternative is to conclude that the framers intended to permit the states to continue to develop sources of ninth amendment rights after the Constitution's adoption. To reconcile this conclusion with the supremacy clause it is necessary to assume that, from the clean slate of constitutional adoption, both the federal Congress and the states possessed concurrent authority to modify personal positive

stitution of this state had been guarantied by the United States . . . , it must have precluded the state from making any alteration in it, should [Massachusetts] see fit so to do." 2 *id.* at 101.

101. 3 *id.* at 451 (G. Nicholas).

102. 4 *id.* at 565 (J. Madison, *Report on the Virginia Resolutions*).

103. 3 *id.* at 461 (P. Henry); see *supra* text accompanying notes 72-79.

104. In evaluating the proposed Constitution during the Philadelphia convention, George Mason concluded that "[t]he laws of the U.S. are to be paramount to State Bills of Rights." 2 RECORDS, *supra* note 81, at 588. For this, among other reasons, Mason opposed the Constitution's ratification by Virginia and, once adoption became inevitable, urged the adoption of a federal Bill of Rights.

105. July 2, 1788. 1 J. ELLIOT, *supra* note 13, at 332.

106. See *supra* notes 58-59 and accompanying text.

rights.¹⁰⁷ To be sure, congressional authority is limited to its delegated powers; state authority is limited by constitutional prohibitions, including the supremacy clause. A principle of priority in time then suggests itself as a vehicle for sorting out the conflicting claims of a state-based ninth amendment right and otherwise legitimate federal legislative action. If the state-law source of the asserted federal ninth amendment right predates the congressional action which would invade the right, the congressional action must yield. If the contrary condition exists, Congress will be deemed to have preempted the field. Such an approach allows for the natural development of democratic institutions in the twin arenas of the Capitol and the state houses. When the people, through their spokespersons, declare a right to be of sufficient importance to be worthy of legal articulation, it becomes preserved through the ninth amendment. But if the right is merely quiescent, and Congress has exercised otherwise legitimate authority to regulate state and personal behavior in a way which would preclude exercise of the inchoate right, it is waived until and unless the federal democracy changes its legislative determination. This proposal may be more nearly consistent with the framers' desire to ensure the continued evolution of state common law¹⁰⁸ but poses enormous practical problems that, in all likelihood, doom it as a seriously workable constitutional mechanism.¹⁰⁹

Limiting ninth amendment positive rights to those having a clear

107. Cf. THE FEDERALIST NO. 82 (A. Hamilton) (concluding that concurrent jurisdiction exists with respect to personal positive rights); *Brown v. Gerdes*, 321 U.S. 178, 188 (1944) (Frankfurter, J., concurring) (federal rights may be vindicated in a state forum unless Congress has conferred exclusive jurisdiction upon federal courts).

108. See *supra* text accompanying notes 99-104.

109. The foremost problem is the difficulty of establishing priority of action between Congress and the several states. Perhaps some rights are of dubious ancestry; rules governing burden of proof could dispose of these questionable claims. Later-admitted states would object that reckoning their citizens' rights by dates of admission to the Union contradicts the principle of equal status of the states. This problem could be avoided by permitting a later-admitted state to assert the priority of earlier states if it has vested its citizens with a reserved ninth amendment right in existence, by reference to sister state sources, prior to its own admission. A cottage industry of legal historians would spring up, bringing greater expense to litigants but providing the valuable benefits of enhanced public understanding of the roots of assumed liberties.

Perhaps most nettlesome would be the issue of the uniform (or nonuniform) character of this federal ninth amendment right. Since it derives its content from state sources, it is logical to view the federal right as one varying in content with the state citizenship of the claimant. For example, a Californian possesses a state constitutional right to privacy. CAL. CONST. art. I, § 1 (1849, amended 1972). Assuming, hypothetically, the absence of a federal constitutional right of privacy, should a Californian be able to assert a federal right not available to an Alabaman? By contrast, what good reason demands that an Alabaman be able to assert a federal right that owes its existence to timely action by the citizens of California? The practical problems thus illustrated reveal this alternative to be hopelessly unworkable.

textual foundation in state sources in existence at the time of the Constitution's adoption avoids the mischief inherent in splitting supremacy clause hairs. Moreover, it permits the asserted ninth amendment right to be uniform in character, a result unlikely to be achieved were the "priority in time" alternative adopted. Since, under this proposal, a federal ninth amendment positive right finds its substance in state action prior to 1788, its boundaries are defined by the pre-1788 organic law of all of the original states, taken together. A ninth amendment right thus derived is identical for all citizens, whatever their state citizenship, and operates to block federal action invasive of this right.

Commentators agree that the ninth amendment operates, if at all, against federal action.¹¹⁰ Disagreement begins when attempts are made to apply the amendment as a barrier to state action.¹¹¹ Most such attempts have utilized the incorporation doctrine, by which specific guarantees of the Bill of Rights have been held applicable to the states through the fourteenth amendment.¹¹² Superficially, it would appear that it is not "logically possible to 'incorporate' the ninth amendment through the fourteenth to apply as a prohibition against the states, because the ninth amendment was designed not to circumscribe but to protect the enactments of the states."¹¹³ But if one considers that the federal character of ninth amendment positive rights derives from state action, application of the ninth amendment to the states would merely amount to a federally enforced right to make the states abide by their own law. For a government to abide by its own law is of the essence of due process.¹¹⁴

110. J. ELY, *supra* note 2; Berger, *supra* note 2.

111. Compare Berger, *supra* note 2, at 23-24 and Caplan, *supra* note 2, at 264 with Redlich, *Are There "Certain Rights . . . Retained by the People?"*, 37 N.Y.U. L. REV. 787, 806 (1962) (suggesting application of ninth amendment to states through fourteenth amendment) and C. BLACK, *supra* note 2; see also *Griswold v. Connecticut*, 381 U.S. 479, 493 (1981) (Goldberg, J., concurring):

[T]he Ninth Amendment, in indicating that not all such liberties are specifically mentioned in the first eight amendments, is surely relevant in showing the existence of other fundamental personal rights, now protected from state, as well as federal, infringement. In sum, the Ninth Amendment simply lends strong support to the view that the "liberty" protected by the Fifth and Fourteenth Amendments from infringement by the Federal Government or the States is not restricted to rights specifically mentioned in the first eight amendments.

112. See, e.g., *Duncan v. Louisiana*, 391 U.S. 145 (1968); *Washington v. Texas*, 388 U.S. 14 (1967); *Klopfer v. North Carolina*, 386 U.S. 213 (1967); *Pointer v. Texas*, 380 U.S. 400 (1965); *Gideon v. Wainwright*, 372 U.S. 335 (1963); *Mapp v. Ohio*, 367 U.S. 643 (1961); *In re Oliver*, 333 U.S. 257 (1948); *Fiske v. Kansas*, 274 U.S. 380 (1927); *Chicago, Burlington & Quincy R.R. v. Chicago*, 166 U.S. 226 (1897).

113. Caplan, *supra* note 2, at 261-62 (footnote omitted).

114. "The words 'due process of law,' were undoubtedly intended to convey the same meaning as the words 'by the law of the land,' in Magna Charta." *Murray's Lessee v. Hobo-*

Since the fourteenth amendment demands that states not "deprive any person of life, liberty, or property, without due process of law,"¹¹⁵ it is no grotesque distortion of either the ninth or fourteenth amendments to read into them a requirement that a state observe its own law.¹¹⁶ Moreover, this result is highly compatible with Madison's observation that positive rights secured by the Bill of Rights are procedural in nature.¹¹⁷

However, if incorporation is deemed undesirable, a state may still be required to enforce its own law through the guarantee clause.¹¹⁸ This approach would require a substantial modification in the accepted understanding of that clause. Since *Luther v. Borden*¹¹⁹ the guarantee clause has evaded judicial review because it has been consigned to the nether world of nonjusticiability. But reading the clause as a federal constitutional guarantee "that the states either observe their own constitutions and laws or change them by legally valid procedures"¹²⁰ is a peculiarly well-suited vehicle for enforcing state compliance with the state laws which form the content of ninth amendment positive rights. When introducing the Bill of Rights, Madison explained its necessity, in part, by observing that "some states have no bills of rights," and those that did had failed to secure rights to "the full extent which republican principles

ken Land & Improvement Co., 9 U.S. (18 How.) 272, 276 (1855) (citing 2 E. COKE, INSTITUTES *45, *50); see also Corwin, *supra* note 54, at 378.

115. U.S. CONST. amend XIV, § 1.

116. In order to give full effect to such a guarantee it would be helpful to discard the current erroneous understanding of the eleventh amendment, which reads:

The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

U.S. CONST. amend. XI. The current doctrine, based on *Hans v. Louisiana*, 134 U.S. 1 (1890), holds that a citizen may not sue his own state directly in federal court, *Employees v. Missouri Pub. Health & Welfare Dep't*, 411 U.S. 279 (1973), nor even invoke federal jurisdiction to compel his own state to observe its own law. *Pennhurst State School & Hosp. v. Halderman*, 465 U.S. 89 (1984). The current doctrine proceeds from the mistaken assumption that the eleventh amendment was intended to constitutionalize state sovereign immunity as a result of the profound "shock of surprise" created by *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419 (1793), which held Georgia amenable to suit by a South Carolina creditor. *Hans*, 134 U.S. at 11. The doctrine ignores the plain language of the eleventh amendment, the history of its adoption, and the century of judicial interpretation of its text prior to the 1890 *Hans* decision. See generally *Pennhurst*, 465 U.S. at 125 (Brennan, J., dissenting); Gibbons, *The Eleventh Amendment and State Sovereign Immunity: A Reinterpretation*, 83 COLUM. L. REV. 1889 (1983); Massey, *The Pennhurst Decision: Ignoring the History of the 11th Amendment*, L.A. Daily J., Oct. 5, 1984, at 13.

117. See *supra* text accompanying notes 30-31.

118. "The United States shall guarantee to every State in this Union a Republican Form of Government . . ." U.S. CONST. art. IV, § 4, cl. 1.

119. 48 U.S. (7 How.) 1 (1849).

120. Note, *supra* note 72, at 561.

would require."¹²¹ This contemporaneous expression is a plain indication that both the specific and unenumerated rights which compose the Bill of Rights form part of the core understanding of the meaning of republican government. Moreover, conformity to law is at the heart of any conception of republican government.¹²² This reading of the guarantee clause modifies but in no way distorts the established conception of the clause,¹²³ helps effectuate the ninth amendment without damaging other constitutional values,¹²⁴ and conforms to the constitutional duty to decide cases and controversies.¹²⁵

V. Natural Rights

Since the "great and principal rights of mankind"¹²⁶ protected by the ninth amendment include both positive and natural rights, it is necessary to confront the amorphous goblin of natural law in order to define natural ninth amendment rights without reference to sources wholly extrinsic to the Constitution.¹²⁷ Madison's contention that "natural rights [are] retained"¹²⁸ by the people is consistent with the theory that natural rights find their source in the immutable, inalienable rights of mankind, possessed apart from and transcendent to government.¹²⁹ It is the tran-

121. 1 ANNALS OF CONG., *supra* note 20, at 452.

122. See the authorities collected in Note, *supra* note 72, at 566 n.34.

123. *Id.* at 565-73.

124. Cf. C. BLACK, *supra* note 29, at 33-51 (constitutional interpretation should take place within whole context of legal and political structures created by the Constitution).

125. U.S. CONST. art. III, § 2; *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803).

126. 3 J. ELLIOT, *supra* note 13, at 461 (Patrick Henry).

127. See *supra* notes 37-49 and accompanying text.

128. 5 MADISON WRITINGS, *supra* note 11, at 389 n.1.

129. W. FRIEDMANN, *LEGAL THEORY* 117-27 (5th ed. 1967). That this notion was central to the framers' intellectual understanding of their government can be seen from the Declaration of Independence, which echoed earlier colonial declarations of rights:

We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the Pursuit of Happiness—That to secure these Rights, Governments are instituted among Men, deriving their just powers from the consent of the governed.

The Declaration of Independence para. 1 (U.S. 1776). At the Constitutional Convention, Madison observed that the people are "the fountain of all power." 2 RECORDS, *supra* note 81, at 476. Edmund Pendleton echoed Madison during the Virginia ratification convention: "Who but the people have a right to form government?" 3 J. ELLIOT, *supra* note 13, at 37. As early as 1775, Alexander Hamilton proclaimed his allegiance to natural law principles. 1 THE WORKS OF ALEXANDER HAMILTON 61-64, 87 (H. Lodge ed. 1904). Indeed, Hamilton went so far as to proclaim:

The Sacred Rights of Mankind are not to be rummaged for among old parchments or musty records. They are written, as with a sunbeam, in the whole volume of human nature, by the hand of the Divinity itself, and can never be erased or obscured by mortal power.

scendent authority of these rights that makes them important to confront; it is their gossamer nature that makes them virtually impossible to discern by application of neutral principles. If they be paramount to legislative action, it is no accident that the framers selected the phrase "retained by the people"¹³⁰ to describe these rights. Positive rights acquired substance by the social compact; hence their retention by the people was ceded to the government as part of the initial governmental contract.¹³¹ Natural rights could not, by definition, be so ceded. Hence it is logically anomalous to conclude that the people's assertion of a retained natural right against state action infringing that right is not proper.¹³²

The hard task is finding principled substance in these natural rights. When it is recalled that the objective in erecting a constitutional barrier to the denial of retained, unenumerated rights was to preserve the great and principal rights of man, it becomes apparent that it is possible to borrow from existing constitutional theory to put flesh on these skeletal rights. The doctrine of fundamental rights, long a part of equal protection analysis,¹³³ seems most conceptually akin to Patrick Henry's great and principal rights.¹³⁴ Moreover, to be consistent with Lockean political theory, such fundamental rights must be seen to be precisely coterminous with private rights not subject to invasion by legitimate private action. Yet, for purposes of finding those paramount fundamental rights protected by the ninth amendment against state or federal invasion, some limiting principles are prudent. An asserted fundamental right should

Id. at 113; see also *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 404-05 (1819).

130. U.S. CONST. amend. IX.

131. See *supra* notes 47 & 82.

132. This conclusion encounters difficulty when it is recalled that the enumerated rights (among them some natural rights) were not originally intended to be enforceable against the states: "Had congress engaged in the extraordinary occupation of improving the constitutions of the several states by affording the people additional protection from the exercise of power by their own governments in matters which concerned themselves alone, they would have declared this purpose in plain and intelligible language." *Barron v. Mayor of Baltimore*, 32 U.S. (7 Pet.) 243, 250 (1833). Establishment of the incorporation doctrine as a fixture of constitutional law removes most of these difficulties. Incorporation implicitly recognizes that the paramount nature of the enumerated rights overrides state attempts to rescind their guarantees. See *supra* note 112 and accompanying text.

133. See, e.g., *Shapiro v. Thompson*, 394 U.S. 618 (1969); *Harper v. Virginia State Bd. of Elections*, 383 U.S. 663 (1966); *Reynolds v. Sims*, 377 U.S. 533, 561-62 (1964); cf. *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1885).

134. Natural law is long-established in American law. See W. FRIEDMANN, *supra* note 129, at 136-51; see also *supra* notes 46 & 49-57 and accompanying text; *infra* notes 198-99. If fundamental rights have any philosophical foundation, it is upon the rock of natural law which has actuated so much of American legal thought. See *supra* note 129; Corwin, *supra* note 32, at 152; Corwin, *The Debt of American Constitutional Law to Natural Law Concepts*, 25 NOTRE DAME LAW. 258 (1950).

have textual foundation in the Constitution, however implicit or attenuated.¹³⁵ It should have some historical authenticity in the organic law of the nation, the states, the colonies, or the common law. It should be consistent with the theoretical construct of natural rights, so far as that subject can provide meaning.¹³⁶ It should be a right generally recognized by a significant portion of contemporary society as one inextricably connected with the inherent dignity of the individual.¹³⁷

A. The Right of Privacy

The right of privacy, particularly as manifested in intimate choices regarding marital sex and procreation, is the constitutional right most closely associated with the ninth amendment.¹³⁸ Where, if at all, does this right fit analytically into the constitutional template constructed thus far? First, privacy would not seem to be a positive or civil right. It is not manufactured by operation of the social compact, as Madison thought of the right to trial by jury.¹³⁹ That is, in parting with unfettered personal autonomy in order to create government, a right of privacy was not thereby created as a regulation upon the procedural action of the community. Rather, a substantive right of privacy would seem to exist independently of the acts of civil authorities. A right of privacy is thus at least consistent with the theoretical understanding of natural rights, although justifying a right of privacy as a ninth amendment right solely by reference to natural law theory is tautological. Fortunately, there are more secure anchors. Privacy has historical authenticity. Its roots may be traced back from *Griswold* to *Olmstead v. United States*¹⁴⁰ to the nine-

135. In this connection, the utility of finding constitutional meaning in "structure and relationship" is germane. See C. BLACK, *supra* note 29. This limitation is plainly not required by the ninth amendment, which indeed would seemingly preclude reliance upon textual foundations other than the amendment itself. The proposed limitation is prudential only, intended to limit judicial resort to personal values and subjective preferences. See *supra* notes 37-42 and accompanying text.

136. At the very least, an asserted fundamental right ought to be plainly inferable from the analytical arguments advanced by natural law scholars.

137. No suggestion is made that an asserted right must command a majority. Given the anti-majoritarian nature of judicial review, this is unlikely. Rather, the right, even if highly controversial, should be recognized to exist in concepts of inherent human dignity. A contemporary paradigmatic example is the asserted right of a woman to freely terminate her pregnancy.

138. No doubt this association is primarily due to Justice Goldberg's concurrence in *Griswold v. Connecticut*, 381 U.S. 479, 486 (1965); see also *Roe v. Wade*, 410 U.S. 113 (1973); *Doe v. Bolton*, 410 U.S. 179 (1973); *infra* text accompanying notes 145-62.

139. See *supra* notes 47 & 82.

140. 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting); see Caplan, *supra* note 2, at 266 n.176.

teenth-century torts commentator, Judge Cooley, who described the right as the "right to be let alone."¹⁴¹ Cooley, in turn, in all likelihood distilled the right from the package of fundamental personal rights conceived by Blackstone to consist of the inviolate nature of the person¹⁴² and recognized by the Anglo-American adage, "a man's home is his castle."¹⁴³

Privacy also has a textual foundation in the Constitution. The first amendment secures basic freedoms of thought, expression, and association; the third and fourth preserve inviolate the individual home and person. While this textual warrant is concededly attenuated, it is safe to derive from the context and intent of these enumerated rights a concern that individuals, in their homes and with respect to their persons and effects, remain free from unwarranted governmental intrusion.¹⁴⁴ Although privacy, as manifested in the right of a woman to determine whether or not to continue her pregnancy, is undoubtedly a subject of great public controversy, there can be no question that a significant portion of our contemporary society regards this right as one inherent in the dignity of the individual. By application of these criteria it can thus be seen that privacy is a fundamental right of constitutional stature. Possessed of this status, it should be confidently asserted against rival governmental claims, whether federal or state.

By contrast, current constitutional privacy jurisprudence is unnecessarily muddled. Rather than grounding privacy rights squarely amid the unenumerated natural rights secured by the ninth amendment, it uses as its constitutional anchor the due process clauses of the fifth and fourteenth amendments. This due process source was first identified in *Meyer*

141. T. COOLEY, *LAW OF TORTS* 29 (2d ed. 1888).

142. 1 W. BLACKSTONE, *COMMENTARIES* *119-20, *130.

143. This maxim has roots in English law that are recorded in decisional law as early as 1605. *Semayne's Case*, 5 Co. Rep. 91, 77 Eng. Rep. 194 (K.B. 1605). According to Corwin, the adage may have existed as early as Justinian's Digest. See Corwin, *supra* note 54, at 371 n.19.

144. Professor Caplan, however, asserts that

privacy as now understood . . . did not develop until the mid-eighteenth century and did not fully mature until the nineteenth. Privacy as an all-encompassing constitutional right was accordingly not a part of the legal tradition inherited from England by the colonies which would have been secured in either a state or federal bill of rights.

Caplan, *supra* note 2, at 267 (footnotes omitted). It is noteworthy that Professor Caplan's cited authorities all deal with the colonial experience in Puritan New England. A tradition of far less governmental intrusion in private affairs existed in Rhode Island, New York, Pennsylvania, and, for a time, Maryland. See T. CURRY, *supra* note 76, at 29-77. Moreover, Caplan's conclusion in this instance rests on the dubious assumption that ninth amendment rights are static.

*v. Nebraska*¹⁴⁵ as the constitutional agent which secured the liberty "to marry, establish a home and bring up children."¹⁴⁶ Two years later *Pierce v. Society of Sisters*¹⁴⁷ concluded that the same due process clause protected "the liberty . . . to direct the upbringing and education of children."¹⁴⁸ It is no accident that the Court selected the due process clauses as the vehicle to secure these felt liberties. The doctrinal mainstream of the Court in the 1920s was still in the channels of substantive due process; locating these natural liberties among the substance of due process liberties was both consistent and logical. But, as the Court has repudiated substantive due process while reaffirming the constitutional legitimacy of privacy rights, it has created for itself unnecessary doctrinal difficulties coupled with infirm restraints upon the privacy right. A juxtaposition of two cases from the Court's 1985 Term, *Bowers v. Hardwick*¹⁴⁹ and *Thornburgh v. American College of Obstetricians and Gynecologists*¹⁵⁰ highlights the quagmire into which the Court has slipped. Before comparing *Bowers* and *Thornburgh*, however, it will be useful to sketch the evolution of the doctrine.

*Skinner v. Oklahoma*¹⁵¹ used equal protection as the mechanism to strike down an Oklahoma statute permitting involuntary sterilization on the ground that the statute intruded upon "the basic civil rights of man"¹⁵² and was wholly artificial in its application. The Court emphasized the fundamental nature of the right involved, marriage and procreation, as the basis for the strict scrutiny to which the statute was subjected. *Skinner* thus adumbrates the role which fundamental rights play in modern equal protection analysis. Similarly, in *Prince v. Massachusetts*¹⁵³ the Court reaffirmed, on due process grounds, that there is a "realm of family life which the state cannot enter"¹⁵⁴ without compelling justification. In the highly charged atmosphere of racial discrimination,

145. 262 U.S. 390 (1923). *Meyer* was not the first case to allude to a constitutionally protected privacy right. As early as 1886, the fourth and fifth amendments were held to "apply to all invasions on the part of the government and its employes of the sanctity of a man's home and the privacies of life. It is not the breaking of his doors, and the rummaging of his drawers, that constitutes the essence of the offense; but it is the invasion of his indefeasible right of personal security, personal liberty and private property" *Boyd v. United States*, 116 U.S. 616, 630 (1886).

146. *Meyer*, 262 U.S. at 399.

147. 268 U.S. 510 (1925).

148. *Id.* at 534-35.

149. 106 S. Ct. 2841 (1986).

150. 106 S. Ct. 2169 (1986).

151. 316 U.S. 535 (1942).

152. *Id.* at 541.

153. 321 U.S. 158 (1944).

154. *Id.* at 166.

the Warren Court concluded, in *Loving v. Virginia*,¹⁵⁵ that a state statute barring racially mixed marriage was offensive to the liberty of marriage secured by the due process clauses.¹⁵⁶ During the same period, the Court decided *Griswold*, in which the liberty interest protected was characterized in a concurrence by Justice White as the right "to be free of regulation of the intimacies of the marriage relationship."¹⁵⁷ Similarly, *Eisenstadt v. Baird*¹⁵⁸ invalidated a Massachusetts statute prohibiting contraceptive use by either married or unmarried couples. The *Eisenstadt* Court specifically dismissed marriage as a prerequisite for assertion of the liberty interest there advanced, characterizing the protected right as the "decision whether to bear or beget a child."¹⁵⁹ The watershed cases of *Roe v. Wade*¹⁶⁰ and *Doe v. Bolton*¹⁶¹ held that "a woman's decision whether or not to terminate her pregnancy" is among the liberty interests protected by the due process clause.¹⁶²

To reach these conclusions the Court has first characterized the claimed liberty interests as fundamental rights deserving of heightened judicial protection.¹⁶³ In sifting the fundamental from the incidental the Court has used, as its sieve, concepts acquired from due process jurisprudence. Justice White, for example, categorizes fundamental rights as either those "implicit in the concept of ordered liberty, such that 'neither liberty nor justice would exist if [they] were sacrificed'"¹⁶⁴ or those "deeply rooted in the Nation's history and traditions."¹⁶⁵

Application of this doctrine during this past Term has produced confusing, inconsistent results. In *Bowers v. Hardwick*¹⁶⁶ the Court, by a five to four margin, concluded that a Georgia statute making private, consensual anal or oral sex a felony did not violate the constitutional privacy right as applied to homosexuals. To reach this conclusion Justice White distinguished the earlier privacy cases as limited to rights of family, marriage, or procreation, then proceeded to dismiss any claimed

155. 388 U.S. 1 (1967).

156. The Court struck down the statute on equal protection grounds as well as finding that the law deprived the Lovings of due process by denying them the "freedom of choice to marry" that had "long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men." *Id.* at 12.

157. *Griswold v. Connecticut*, 381 U.S. 479, 502-03 (1965) (White, J., concurring).

158. 405 U.S. 438 (1972).

159. *Id.* at 453.

160. 410 U.S. 113 (1973).

161. 410 U.S. 179 (1973).

162. *Roe v. Wade*, 410 U.S. at 153.

163. *Bowers*, 106 S. Ct. at 2843.

164. *Id.* at 2844 (quoting *Palko v. Connecticut*, 302 U.S. 319, 325-26 (1937)).

165. *Id.* (quoting *Moore v. City of East Cleveland*, 431 U.S. 494, 503 (1977)).

166. 106 S. Ct. 2841 (1986).

right to engage in private, consensual anal or oral sex as both unrelated to these identified rights and not deserving of characterization as a fundamental right. In reaching the latter result, Justice White relied heavily on the historical facts that sodomy was a common-law crime, had been made criminal by each of the original states when the Bill of Rights was adopted in 1791, and was subject to criminal penalties in thirty-two of the thirty-seven states in existence when the fourteenth amendment was adopted in 1868. Perhaps most unfortunate was Justice White's express refusal to evaluate the ninth amendment rights asserted in *Hardwick's* initial complaint but, apparently, not explicitly urged upon the Court at oral argument.¹⁶⁷

Even viewed as a due process case, Justice White's reasoning in *Bowers* cannot withstand minimal, much less close, scrutiny. Assuming, *arguendo*, that the fundamental rights secured by prior privacy case law are limited to those revolving around family, marriage, or procreation, Justice White's conclusory implication that no nexus can be found between anal or oral sexual activity and these identified rights is erroneous. *Moore v. City of East Cleveland*¹⁶⁸ reminds us not to "close our eyes to the basic reasons why certain rights associated with the family have been accorded shelter under the Fourteenth Amendment's Due Process Clause."¹⁶⁹ As Justice Blackmun noted, "[w]e protect those rights not because they contribute, in some direct and material way, to the general public welfare, but because they form so central a part of an individual's life."¹⁷⁰ To Justice Stevens, "the concept of privacy embodies the 'moral fact that a person belongs to himself and not to others nor to society as a whole.'"¹⁷¹ Because "sexual intimacy is 'a sensitive, key relationship of human existence, central to family life, community welfare, and the development of human personality,'"¹⁷² and the "ability independently to define one's identity . . . is central to any concept of liberty,"¹⁷³ only "the most willful blindness"¹⁷⁴ can conclude that there is no linkage between existing privacy guarantees and the right to engage in private, consensual oral or anal sex.

167. Compare *id.* at 2846 & n.8 with *id.* at 2849-50 (Blackmun, J., dissenting).

168. 431 U.S. 494 (1977).

169. *Id.* at 501.

170. *Bowers*, 106 S. Ct. at 2851 (Blackmun, J., dissenting).

171. *Thornburgh*, 106 S. Ct. at 2187 n.5 (Stevens, J., concurring) (quoting Fried, Correspondence, 6 PHIL. & PUB. AFF. 288-89 (1977)), quoted in *Bowers*, 106 S. Ct. at 2851 (Blackmun, J., dissenting).

172. *Bowers*, 106 S. Ct. at 2851 (Blackmun, J., dissenting) (quoting Paris Adult Theatre I v. Slayton, 413 U.S. 49, 63 (1973)).

173. *Roberts v. United States Jaycees*, 468 U.S. 609, 619 (1984).

174. *Bowers*, 106 S. Ct. at 2851 (Blackmun, J., dissenting).

Moreover, because the Court chose to hem itself in by selective, and artificially limited, tests of fundamental liberties, Justice White was able to offer, as conclusive evidence of its lack of fundamental status, the historical fact that sodomy was generally criminal in 1791 and 1868. This mechanical assembly fails adequately to explain *Loving v. Virginia*, in which the Court invalidated a Virginia statute outlawing interracial marriage despite uncontroverted proof that the statute (and others like it) had long historical roots.¹⁷⁵ The result in this case serves to further illustrate the bankruptcy of the due process analytical framework in the context of fundamental liberties associated with privacy.¹⁷⁶

Whatever conceptual scaffolding is erected, there is an uneasy dis-

175. 388 U.S. 1, 3 (1967); see *Bowers*, 106 S. Ct. at 2854 n.5 (Blackmun, J., dissenting). In other settings, the Court has vindicated fundamental rights despite impressive historical prohibition of the claimed right. For example, since the Middle Ages, English law had provided for the removal of an indigent from the community. This scheme persisted and finally resulted in the 1662 Law of Settlement and Removal. This act was the model for similar colonial statutes. Removal of a pauper was upheld by the Supreme Court of Pennsylvania in *Fallowfield Township v. Marlborough Township*, 1 U.S. (1 Dall.) 32 (1776), and quashed on a technicality in *Upper Dublin Overseers of the Poor v. Germantown Overseers of the Poor*, 2 U.S. (2 Dall.) 213 (1793). The Supreme Court generally validated state laws inhibiting the free movement of indigents in *City of New York v. Miln*, 36 U.S. (11 Pet.) 102, 142-43 (1837). Yet in *Edwards v. California*, 314 U.S. 160 (1941), the Court struck down a California statute, which had existed in some version since 1860, prohibiting the introduction into California of any indigent. Mr. Justice Byrnes rejected these historical buttresses because they "no longer fit the facts." *Id.* at 174. *Edwards* was decided under the commerce clause, but the right involved—freedom of movement—is a fundamental right. See *Shapiro v. Thompson*, 394 U.S. 618 (1969).

176. The *Bowers* majority chose to skate by the fact that the Georgia statute at issue prohibits, on its face, all oral or anal sex, wherever it may occur, whether between married or unmarried heterosexuals or unmarried homosexuals. GA. CODE ANN. § 16-6-2 (1984). Thus, the statute is facially suspect when analyzed in light of the most orthodox privacy precedents.

In its October 1986 Term, the Court has created further confusion in whatever doctrine *Bowers* established. In *Oklahoma v. Post*, 715 P.2d 1105 (Okla. Crim. App. 1986), cert. denied, 55 U.S.L.W. 3249 (Oct. 14, 1986) (No. 85-2071), the Oklahoma Court of Criminal Appeals held that a man's criminal conviction for consensual oral and anal sex with a woman must be set aside because "the right to privacy, as formulated by the Supreme Court, includes the right to select consensual adult sex partners." *Id.* at 1109. The Oklahoma court, writing prior to *Bowers*, relied on *Carey v. Population Servs. Int'l*, 431 U.S. 678 (1977), *Eisenstadt v. Baird*, 405 U.S. 438 (1972), and *Stanley v. Georgia*, 394 U.S. 557 (1969), to reach this conclusion. The court also explicitly relied, in part, on Justice Goldberg's *Griswold* concurrence emphasizing the relevance of the ninth amendment to the *Griswold* holding. The Oklahoma court was careful to limit its decision to consensual adult heterosexual sex, specifically disavowing any application of the decision to homosexual activity.

Following *Bowers*, one would suppose that the Supreme Court would have granted certiorari, if only to correct summarily Oklahoma's presumably erroneous notion of constitutional privacy rights. Its refusal to do so merely leads to further confusion. Is *Bowers* now to be read as a denial only to homosexuals of the right to select consensual sex partners? Does the Court wish to permit the states latitude to formulate independent notions of the limits of the privacy right? If so, the desire is inefficacious without further explication of the grossly disparate results in *Post* and *Bowers*.

harmony between *Bowers* and *Thornburgh*, decided just nineteen days apart. In *Thornburgh*, the Court, again by a five to four margin, invalidated key portions of Pennsylvania's 1982 Abortion Control Act,¹⁷⁷ which imposed restrictions upon the availability of abortions. In concluding that a state may not "intimidate women into continuing pregnancies"¹⁷⁸ by erecting powerful psychological and legal barriers to an abortion, the Court reaffirmed the constitutional foundation of *Roe v. Wade*. In doing so, Justice Blackmun observed:

Our cases long have recognized that the Constitution embodies a promise that a certain private sphere of individual liberty will be kept largely beyond the reach of the government. . . . Few decisions are more personal and intimate, more properly private, or more basic to individual dignity and autonomy, than a woman's decision—with the guidance of her physician and within the limits specified in *Roe*—whether to end her pregnancy. A woman's right to make that choice freely is fundamental. Any other result, in our view, would protect inadequately a central part of the sphere of liberty that our law guarantees equally to all.¹⁷⁹

Noteworthy by its absence is any mention of the precise constitutional bedrock upon which these liberties are grounded. By implication, of course, the due process clauses clothe these liberties with constitutional protection. But, it is possible that Justice Blackmun, who briefly flirted with the ninth amendment as an alternative source for protecting the right claimed by *Hardwick*,¹⁸⁰ at least may be thinking about application of the ninth amendment to privacy rights. If so, he may be alone, for Justices Stevens, White, and Rehnquist plainly view the due process clauses as the doctrinal source of the liberty interest protected by *Thornburgh*.¹⁸¹

B. Privacy and the Ninth Amendment

Would it make any difference if these issues were analyzed as claimed unenumerated natural rights under the ninth amendment? The initial inquiry, which has already been decided affirmatively within the due process framework, is whether a privacy right, however manifested, is constitutionally protected. As discussed above,¹⁸² privacy as an abstraction fits neatly into the template proposed for evaluation of prospec-

177. 18 PA. CONS. STAT. §§ 3201-3220 (1983).

178. *Thornburgh*, 106 S. Ct. at 2178.

179. *Id.* at 2184-85 (citations omitted).

180. *Bowers*, 106 S. Ct. at 2849 (Blackmun, J., dissenting).

181. *Thornburgh*, 106 S. Ct. at 2185 (Stevens, J., concurring); *id.* at 2194 (White, J., dissenting).

182. See *supra* text accompanying notes 133-44.

tive unenumerated natural rights. Let us now examine the specific claimed rights in *Thornburgh* and *Bowers* through the ninth amendment lens.

In *Thornburgh*, the reconstructed ninth amendment claim is that a woman has an unenumerated natural right to choose whether to continue her pregnancy, without interference from the state in that decision. This right finds textual warrant in several places: the fourth amendment's guarantee of "[t]he right of the people to be secure in their persons," the first amendment's guarantee of free association,¹⁸³ and the third amendment's limited guarantee of the inviolability of the home.¹⁸⁴

The right has historical authenticity. To be sure, it is disingenuous to claim that a woman's right to control her pregnancy has been expressly recognized since the nation's formation. Such an inquiry is hollow because abortion, like computers and video machinery, was simply not a part of the landscape in the late eighteenth century.¹⁸⁵ To attempt to disprove the claimed right in such fashion is "to use history as drunks use lampposts—more for support than for illumination."¹⁸⁶ The proper historical inquiry is one which seeks to determine "what history teaches are the traditions from which [the nation's constitutional jurisprudence] developed as well as the traditions from which it broke. That tradition is a living thing."¹⁸⁷ And that tradition is not slavishly devoted to fidelity to past practice. In promoting the unratified Constitution, Madison observed:

183. In speaking of "free association," I am loosely construing the specific guarantees of the first amendment. Taken together, the animating impulse of the first amendment is to ensure freedom of thought, expression, assembly or association, and political participation. Thought, expression, and association form the heart of individual autonomy and are essential attributes of "the fundamental interest all individuals have in controlling the nature of their intimate associations with others." *Bowers*, 106 S. Ct. at 2852 (Blackmun, J., dissenting).

184. "No Soldier shall, in time of peace be quartered in any house, without the consent of the Owner, nor in time of war, but in a manner to be prescribed by law." U.S. CONST. amend. III. Though this amendment may seem to be an antiquarian relic, its substance provides further evidence of "original intent" that individual privacy be protected and preserved.

185. Abortion performed before "quickening"—recognizable movement of the fetus—was not a common-law crime. 3 E. COKE, INSTITUTES *50; 1 W. BLACKSTONE, COMMENTARIES *125-26. Although Lord Coke believed that abortion after quickening was "a great misprision, and no murder," 3 E. COKE, INSTITUTES *50, and Blackstone styled the offense less severe than manslaughter, 1 W. BLACKSTONE, COMMENTARIES *125-26, some modern scholars believe abortion was never a common-law crime, whenever performed. See authorities collected in *Roe v. Wade*, 410 U.S. at 135 n.26. The first American legislation criminalizing abortion was enacted by Connecticut in 1821. See *id.* at 138 n.29.

186. Abrams, *Mr. Meese Caricatures the Constitution*, N.Y. Times, July 25, 1986, at A31, col. 6.

187. *Poe v. Ullman*, 367 U.S. 497, 543 (1961) (Harlan, J., dissenting), quoted in *Thornburgh*, 106 S. Ct. at 2189 (Stevens, J., concurring).

[T]he glory of the people of America [is] that whilst they have paid a decent regard to the opinions of former times and other nations, they have not suffered a blind veneration for antiquity, for custom, or for names, to overrule the suggestions of their own good sense, the knowledge of their own situation, and the lessons of their own experience.¹⁸⁸

To this spirit Madison attributed the Constitution's innovations "in favor of private rights and public happiness."¹⁸⁹ Without such resolution, "the people of the United States . . . must at best have been laboring under the weight of some of those forms which have crushed the liberties of the rest of mankind."¹⁹⁰ Thus, the historical authenticity to be sought is the historical current of constitutional thought. Viewed in this fashion, it is plainly evident that "the balance struck by this country"¹⁹¹ has been moving inexorably toward greater security and freedom, whether economic or personal, for the female majority of this society.

The right claimed in *Thornburgh* is wholly consistent with the theory of natural rights. It is not a right created by or dependent upon the original grant of power from private citizens to the representative government. Nor could the right legitimately be invaded by private action prior to the creation of the representative government which succeeded to those private rights. Pregnancy is a uniquely personal condition, inextricably linked with a woman's most intimate choices of association. To suggest that a woman's rights concerning this condition flow from or can be conditioned by the Lockean sovereign is to pervert horribly the political theory that actuated the framers and that is embodied in the Constitution.¹⁹²

Despite the emotion which the subject generates, a woman's right of choice to continue her pregnancy unassailably turns on competing conceptions of the inherent dignity of the individual. Even its opponents frame their opposition in such terms, choosing to concentrate on the inherent dignity of the embryonic individual rather than on that of the acknowledged individual faced with the personal anguish of decision.

The ninth amendment right asserted in *Bowers* is, most abstractly, the right of individuals to control the nature of their intimate associations with others. More concretely, it is a right to engage in private, consensual sex acts without interference or limitations imposed by the state. It is not limited to homosexuality, as the *Bowers* majority charac-

188. THE FEDERALIST NO. 14 at 52 (J. Madison) (6th ed. 1847).

189. *Id.*

190. *Id.*

191. *Poe v. Ullman*, 367 U.S. 497, 543 (1961) (Harlan, J., dissenting), quoted in *Thornburgh*, 106 S. Ct. at 2189 (Stevens, J., concurring).

192. See *supra* notes 50-57; *infra* notes 198-99 and accompanying text.

terized the claim. The textual foundation for the claimed right is found most strongly in the fourth amendment, but powerful support is to be enlisted from the first and third amendments.¹⁹³

Several sources provide historical support for the claimed right. First, as the *Bowers* majority implicitly acknowledged, oral and anal sex (or sodomy, to use the Court's preferred label) has existed as long as humans have recorded history. The fact that sodomy has also been consistently criminal is of no more force in *Bowers* than was the consistent historic criminality of racially mixed marriages in *Loving v. Virginia*.¹⁹⁴ Second, the privacy right has plainly evolved in the direction of more extensive protection for the individual's intimate sexual choices. It is this moving target of tradition which the Court should seek to hit, not some static bull's-eye of historic public moral condemnation.¹⁹⁵ Indeed, the focus on historic public condemnation of sodomy only serves to remind the reader that, behind the public posture, the condemned behavior has persisted for millenia. It is a strange historical authenticity that focuses on the reflections of history and fails to examine the deep pool of human nature from which the reflections shine.

The right to engage freely in private, consensual sex is a paradigmatic natural right. Can it be seriously contended that the social compact creates the right to have sexual relations? What private right, to which the state is the successor, could be asserted to circumscribe private, consensual sexual behavior? Whatever arguments may be made concerning the efficacy of natural rights theory, sex is one right which is undeniably, and powerfully, natural.

Similarly, only the most withered of souls would contend that an individual's personal choices of intimate relations are other than inextricably linked to the inherent dignity of the individual. Even though the right litigated in *Bowers* was seen to be morally loathsome to many, a moment's objectivity on the part of the moral condemnors would lead to an admission that an individual's choice of when to have private sex, with whom, and in what fashion, is at the heart of the definition of individual freedom.

193. See *supra* notes 182-84 and accompanying text.

194. The historical status of a claimed right (in 1791, 1868, or at any other time) is most relevant to claims that the right is a ninth amendment civil or positive right and of little or no relevance to claims that it is a natural right. See *supra* notes 86-94 and accompanying text.

195. The *Bowers* majority acknowledged this evolution of public choice yet drew a contrary conclusion from the facts. Although the past 25 years have marked the abandonment of criminal penalties for sodomy by 27 states, the *Bowers* majority persisted in labelling "face-tious" any argument that a right to engage in private, adult, consensual sex was historically authentic. *Bowers*, 106 S. Ct. at 2845; cf. *supra* note 176.

The analytical apparatus used to test the sufficiency of an asserted ninth amendment natural right bears many similarities to the criteria employed in evaluating claimed fundamental rights in the context of due process. However, the text of the ninth amendment, its historical genesis, and the structural role it plays in the Constitution provide important and crucial differences. Viewed most literally, the amendment enjoins constitutional interpreters from denying or disparaging unenumerated rights on the basis of the absence of a textual warrant. Thus, contemporary concern about the absence of an explicit textual foundation for an asserted fundamental right such as privacy¹⁹⁶ becomes of no consequence when the claimed right is advanced as an unenumerated natural right protected by the ninth amendment. Nevertheless, prudential concerns mandate some textual foundation apart from the ninth amendment itself.¹⁹⁷ The significant difference from due process analysis is that the textual fidelity required to support a claimed ninth amendment natural right is minimal. When the claimed right is consistent with the theoretical construct of natural rights and a significant portion of contemporary society acknowledges that the right is inherent in the concept of individual dignity, textual fidelity is absolutely supplied by the ninth amendment itself.

The historical genesis of the ninth amendment provides ample support for the conclusion that contemporary expositors of the Constitution ought to be generous in their acceptance of claimed natural rights. The limiting principles suggested are prudential only, are not mandated by the Lockean political theory which actuated the Constitution and Bill of Rights, are not required by the text of the amendment, and were probably not even considered by the framers. Nevertheless, they are appropriate minimal standards to winnow the substantial from the frivolous.

The structural role played by the ninth amendment is often conveniently overlooked. It is a counterweight to the vast momentum generated by governmental power. This is an important, even vital, structural role that is only partially filled by other constitutional guarantees and

196. Justice White best expressed this concern in his opinions in both *Thornburgh*, 106 S. Ct. at 2194 (White, J., dissenting), and *Bowers*, 106 S. Ct. at 2846. The necessity for an "explicit textual warrant" for the right asserted in *Thornburgh* was argued by Solicitor General Fried in the federal government's amicus brief in support of Pennsylvania: "There is no explicit textual warrant in the Constitution for a right to abortion . . . [T]he further afield interpretation travels from its point of departure in the text, the greater the danger that constitutional adjudication will be like a picnic to which the framers bring the words and the judges the meaning." Brief for the United States as Amicus Curiae in Support of Appellant at 24, *Thornburgh*, reprinted in L.A. Daily J., Aug. 20, 1985, at 1, col. 6.

197. See *supra* notes 133-37 and accompanying text.

prohibitions. Indeed, by its terms the amendment is the final counterweight, to be used against governmental intrusion upon the people when all else fails. It is precisely this role which the ninth amendment should play in privacy jurisprudence. It is perhaps due to its absence from the text that the constitutional right of privacy assumes such a tortured shape.

Moreover, the ninth amendment springs from and helps effectuate John Locke's conception of representative government, which is so deftly embodied in the entire Constitution. Lockean theory posits that each man is his own master. In the Lockean state of nature, no political control of any kind is exerted upon the individual.¹⁹⁸ Yet, upon formation of government, some individual rights are ceded to the state for the purpose of more fully securing the liberty of all. Thus "[r]epresentative government begins with the premise that the state's rights against its citizens are no greater than the sum of the rights of the individuals whom it benefits in any given transaction. The state *qua* state has no independent set of entitlements"¹⁹⁹ Because the state possesses only limited rights derived entirely from individual constituents, it cannot regulate individual behavior in any greater fashion than could the individual members of society regulate the behavior of their fellows. To be sure, one purpose of the state is to assume and enforce community powers of self-help to prevent individuals from seizing, through force or fraud, what is not rightfully their own. Accordingly, the Lockean state is empowered to curb rape, murder, pillage, plunder, and other conduct that uses force or deceit to deprive others of what is justly their own. Viewed in light of Lockean political theory, there is no room for state interven-

198. This is not to say that in the theoretical state of nature there are no social controls. Even a politically unorganized society is likely to have a common language, culture, or tradition, and ethical conceptions of right and wrong. These social controls are not enforced by the state, however, and this distinction is significant in contemplating the implications of Lockean theory.

199. R. EPSTEIN, *supra* note 51, at 331. Locke's view of legislative power was as follows:

First, It is not nor can possibly be absolutely arbitrary over the lives and fortunes of the people. For it being but the joint power of every member of society given up to that person, or assembly, which is legislator, it can be no more than those persons had in a state of nature before they entered into society, and gave it up to the community. For nobody can transfer to another more power than he has in himself; and nobody has absolute arbitrary power over himself, or over any other to destroy his own life, or to take away the life or property of another.

J. LOCKE, OF CIVIL GOVERNMENT § 135 (1690). Epstein's view of the governmental powers vested in the Lockean state is forcefully clear: "The sovereign has no absolute power to generate rights. The state can acquire nothing by simple declaration of its will but must justify its claims in terms of the rights of the individuals whom it protects" R. EPSTEIN, *supra* note 51, at 12; see also Corwin, *supra* note 54, at 383-94.

tion in matters so basic to personal autonomy as sex and procreation. Absent force or fraud, one's choice of a sex partner and sex practices are not susceptible to regulation by private action, to which the state is but the successor. Similarly, so long as a fetus is regarded as simply one who would be a citizen,²⁰⁰ a woman's choice concerning pregnancy lacks any element of force which could provide a theoretical justification for state intervention.

Only by ignoring the fundamental political theory embodied in the Constitution can the state be ceded power to intervene in this private arena. The ninth amendment, in current constitutional jurisprudence, is an ill-tended sentry post on the frontier of representative government. Restoration of its intended function would serve as a welcome reminder that "[t]he state is not the source of individual rights or of social community"²⁰¹ but, rather, that the state merely possesses private rights of action which it can exercise for the community benefit. Since individuals lack private-law means of prohibiting private behavior that is not forcibly or deceitfully intrusive upon others, the state is similarly lacking in power. That fundamental nugget of political theory is at the heart of any conception of unenumerated natural rights. It is that vision of representative government that the ninth amendment serves and imposes as an outer boundary upon government action.

VI. Conclusion

The ninth amendment was born amid the heightened concern for both state sovereignty and individual liberty that marked the adoption of the Bill of Rights. It was specifically intended as a catch-all to preserve for the people their great and fundamental rights that were not enumerated in the first eight amendments or elsewhere in the Constitution. Its text mandates treatment of these unspecified rights on a par with the enumerated rights. The framers recognized the source of these unenumerated rights to be largely state common, constitutional, and statutory law. But, because they conceived of both enumerated and unenumerated rights as consisting of positive and natural rights, they recognized an additional, transcendent source of these rights.

Ninth amendment rights are enforceable against the federal government because it is textually logical to do so and because it is not inconsistent with the framers' intent. Since ninth amendment positive rights are state-based, but federal in character, they pose unique potential conflicts

200. *Thornburgh*, 106 S. Ct. at 2188 (Stevens, J., concurring).

201. R. EPSTEIN, *supra* note 51, at 333.

with the supremacy clause. The conflicts are resolvable in part by limiting their state foundation to pre-1788 state law. Natural, or fundamental, ninth amendment rights pose no such conflict with federal action.

While the ninth amendment was not intended to bar state action, to do so is consistent with and efficacious of the due process and republican government guarantees of the Constitution, for in the case of positive rights it would merely compel the states to observe their own laws. Natural or fundamental ninth amendment rights are enforceable against the states because the theoretical understanding of the ninth amendment reservation, in this instance, is to vest these rights in the people, rather than in any government. Being paramount by nature, such rights pose no real conflict with the apparently conflicting original intent of the framers.

Divining fundamental rights in a principled fashion poses problems of noninterpretive judicial review. To eliminate or minimize these problems, courts must recognize as fundamental only those rights which have some textual foundation in the Constitution, can claim historical authenticity in traditional sources of our organic law, are consistent with the theoretical understanding of natural rights, and command recognition as inherent in personal dignity by a substantial portion of contemporary society. As a guide, courts should keep in mind the Lockean principle which the ninth amendment was intended to effectuate: the state can only exercise coercive powers which its constituent members could legitimately exercise in self-defense.

The result of this reading of the ninth amendment is to revive the amendment as a keystone of federalism and as a source of substantive, fundamental personal liberties. Without corresponding changes in other constitutional sources of regulation of federal-state relations, the ninth amendment will not revolutionize federalism. It will, however, provide new life to the states as protectors of the liberties of their citizens against federal encroachment. At the same time, assertion of fundamental ninth amendment rights will operate to prevent the federal or state governments from invading the reserved personal liberties of the people. It is a challenging amendment; it should not languish in desuetude because of the challenge it poses.